REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA

JANUARY AND SEPTEMBER TERMS, 1917.

VOLUME CI.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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IN MEMORIAM

MANOAH B. REESE

At the session of the Supreme Court of the State of Nebraska, January 10, 1918, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Samuel H. Sedgwick, Honorable Francis G. Hamer, Honorable Albert J. Cornish, and Honorable James R. Dean, Associate Justices, the following proceedings were had:

To the Honorable, the Supreme Court of Nebraska:

Your committee, appointed to prepare and submit a testimonial to the life and character of our late Chief Justice Reese, respectfully present the following:

Manoah Bostic Reese was born September 5, 1839. He was admitted to the bar in the state of Iowa. He removed to Nebraska and settled at Plattsmouth in the spring of 1871. In the early part of the following year he removed to Ashland, and early in the next year removed to Wahoo, where he practiced law for ten years, when he was elected judge of this court, taking his seat in January, 1884. Upon retiring from the bench in January, 1890, he removed to Lincoln, where he resided continuously until the day of his death, September 28, 1917. In 1907 he was again elected as one of the judges of this court, taking his seat in January, 1908. By the amendment of the Constitution, in 1908, he became Chief Justice of the Court, which position he held until the expiration of his term in January, 1915. Judge Reese was no ordinary man. All his life he was a close and analytical student of the law. His reputation as a lawyer at the time he retired from this court, in January, 1890, was such that he was very soon appointed Dean of the College of Law of the State University, which

office he held for a number of years. He brought to his position as an instructor in the Law the same ability and industry which had characterized him in the practice of the profession. We feel safe in saying that no man ever held the office of dean in any college of law in the land who so thoroughly impressed his personality upon the students and who so endeared them to their dean as did Judge Reese. He not only imbued the students with an ambition to become real lawyers, but he impressed them with the idea that in becoming lawyers they were becoming members of a great profession, in which honesty and frankness in their dealings with court and client and probity in private life were the main stepping stones to greatness in that profession. As a judge he was absolutely fearless. No outside consideration ever influenced him. He hewed to the line without thought as to where the chips would fall. He was honored and respected by the profession at large and most highly appreciated by his associates on the bench. His life was one well worth living. He left the world the better for his having lived in it. He was courteous to his associates on the bench and to the lawyer who appeared at the bar, regardless of whether such lawyer had won his way to the highest point in his profession or was arguing his first case before the court. He was twice greatly honored by the people of Nebraska by election to the most important office in the state. He repaid the debt with a public life that reflected great honor upon the people who had elected him. He was distinctly a people's man. He abhorred fraud, oppression, and vice of all kinds. If he had any weakness as a judge it was in standing for the weak against the strong, morality against wickedness. Such weakness in any judge is not, after all, a weakness, it is a tower of strength for justice. Add to all this the fact that he was at all times a courteous and Christian gentleman and you have before you a high type of a true American; an honest lawyer, and a conscientious judge.

His death was a great bereavement to his family and a distinct loss to the state which had so signally honored him and which he so greatly loved.

We recommend that this testimonial to our departed Chief Justice be ordered spread upon the journal of this court, and that a copy, duly certified under the seal of the court, be sent to his son and daughter who survive him.

JACOB FAWCETT,
JOHN B. BARNES,
E. E. GOOD,
A. W. JEFFERIS,
JOHN M. TUCKER.

PERSONAL TRIBUTE OF JACOB FAWCETT.

My estimate of the life and character of our departed brother is so fully reflected in the committee's report that I have little to add thereto. One point, not covered, comes to me. The judge was a diligent and painstaking worker. He did not believe in following the line of least resistance in his work. He never did so. During the years that I was associated with him as a member of this court, I learned that he carefully and painstakingly read the record and every brief in every case in which he wrote the opinion. The work of the court is so constant and exacting as to be little short of slavish. The people, and even many lawyers, have little conception, and less care, of the fact that the judges of our supreme court are the hardest worked officials in the state; that they actually work more hours in the day than any other state officers. Other state officers may spend more hours in their offices, but each judge, in the isolation of his private office, is following his daily, nerve-racking grind of examining dry and ofttimes unresponsive records, in an attempt to protect the rights of litigants, and to uphold the law. This court has ever had that class of judges; and I know whereof I speak, and I speak without

any thought of flattery, when I say, it has them now. In the front rank of that line of splendid men and judges, for thirteen years, stood Judge Manoah Bostic Reese. In life I loved and respected him. In death I cherish his memory.

JUDGE JOHN B. BARNES:

May It Please The Court: Having been closely associated with Judge Reese for many years as a member of this court, it is proper for me to speak a few words on this occasion. I first became acquainted with the late Chief Justice in the early part of the year of 1876. At that time he was the district attorney of the Fourth judicial district of this state, and I occupied a like position in the Sixth judicial district. By correspondence and in consultation in regard to the criminal procedure and certain prosecutions in which we were engaged, we became well acquainted, and I soon learned to know his worth and his zeal as a public prosecutor. The acquaintance, thus begun, soon ripened into a firm friendship which lasted without a break until the day of his death. In all the years of our association together I always found him to be a loving companion and a just and upright judge. Judge Reese was a man of high ideals and a friendly disposition. He was an untiring worker, and he brought to his labors great legal learning and an unswerving sense of justice.

It would not be true to say that we were always in accord on legal propositions, but whenever we differed our differences were friendly ones. Judge Reese always accorded to his associates the right of their individual opinions on questions of law or facts, and his remarks in the consultation room left no sting of bitterness. Take him all in all, he was a man who was loved by all who knew him, and one whose like we shall not soon again behold.

It was always greatly to his credit that his judgments, while just, were always tempered with mercy. Judge Reese was of great service to the state, first as a member of the convention that framed our present state Constitution; afterwards as district attorney of his district; as dean of the

university law school; and finally as judge and chief justice of this court. In all of that service he left a clean and honorable record, to which the state and its citizens may point with pride. The people will always remember his achievements in behalf of good government; and his personal friends will forever hold his name in loving memory. We can only say of him:

"Our friend is gone from the sight of men,
His faults, if any, were written in the sand.
His virtues will live forever in the hearts of his friends,
May he rest in peace."

JUDGE EDWARD E. GOOD:

May It Please The Court: He, whose passing has caused this Honorable Court to pause in its usual and regular proceedings that the court and members of the bar may honor his memory, pay tribute to his sterling worth and his praiseworthy achievements, and make a record of the esteem and affection they entertained for him and of their high appreciation of his noble character, was for more than thirty years my close personal friend.

I frequently met him in the practice of his profession. Sometimes we were associated together on the same side of the counsel table, and other times we were on opposing sides. I knew him as Dean of the Law School of the State University and as Justice of this Honorable Court. I knew him as a neighbor, a companion, and a friend. We have spent together several summer vacations in the Rocky mountains of Colorado and toured the Yellowstone National Park as companions and chums. These intimate associations and friendly relations for almost a third of a century gave me an opportunity to know and appreciate one of God's noblemen.

Physically he was robust and vigorous, of more than ordinary stature. He was well proportioned and was a commanding figure in any assemblage of men. Mentally he was well equipped for his profession. While he was keen and shrewd, a clear thinker, a logical reasoner, and gifted with a power of lucid statement, his was not a

scintillating intellect. He reached correct conclusions almost unerringly, but did it by patient mental effort, rather than by intuition.

Morally his standard was of the highest. He never, to my knowledge, countenanced an immoral act, much less was he guilty of one.

Few, if any, are the individuals who have made a deeper, more lasting, or a more favorable impress upon the jurisprudence and history of the state than he. Upon the legal history and structure of the state his thought and influence is everywhere manifest.

He was one of the framers of the state Constitution by which we are now governed. While that instrument may not be adequate to present day needs, by reason of the great changes that lapse of years has brought about, it was considered a model of excellence at the time it was drafted, and met the approval of the people when submitted to them. His industry, keen foresight and unswerving integrity were potent factors in the framing of that historic document.

For many years during the early history of this commonwealth, when crime was much more prevalent than now, he was district attorney for the Fourth judicial district. It was his duty to prosecute many important criminal cases. This duty he performed with strict fidelity and great zeal, and used his talents to make the reign of law supreme. The published reports of the opinions of this court show that he was an able and fearless prosecutor, and that he met with signal success in the performance of his duties.

He was twice elected a justice of this Honorable Court, and gave thirteen years of his life to the performance of the duties incident to that position, and for more than half those years he was Chief Justice. He presided with dignity and fairness. In his relations with counsel and his associates around the counsel table he was uniformly genial, patient, courteous. He was industrious and painstaking in seeking out and applying the principles of law. His opinions, as a rule, are clean, clear cut and vigorous, based on reason and the correct application of

sound legal principles. He was imbued with a belief that justice in the instant case was the great end to be attained, regardless of whether established precedents were followed. Many of his opinions are now recognized as landmarks in the jurisprudence of this state.

During the many years he was Dean of the College of Law he wielded a wide influence in moulding and shaping the professional career of many of the young lawyers of the state. He was not only an instructor of the law, but he instilled sound morals, and a high standard of legal ethics. His life and example were an inspiration to right living, right thinking. He possessed in an unusual degree the faculty of drawing to himself and retaining the ardent admiration and fervent friendship of young men. I have never known a lawyer who graduated while he was dean who did not have a sincere regard and genuine affection for our departed friend.

In all his years of public service I have never known of any of his official acts that have been seriously criticised. No one, so far as I know, has ever questioned the motive which has prompted any of his official acts. He believed in and rigidly lived up to the doctrine that public office is a public trust, and those holding public positions should act with no thought save of the public good.

In his business and personal relations with his fellows he was courteous and obliging, kindly considerate, and always honorable and upright. It was his delight to aid and assist the young and inexperienced. On many occasions, in the trial of cases when he has been pitted against a young lawyer with little experience, he has aided his opponent in developing his case or making a proper record by a kindly hint or suggestion, acting on the theory that justice was the end to be attained, and not an unmerited success. Many, many times, with a clear vision of the difficulties under which the young lawyer was laboring, has he aided him in the solution of difficult problems by stating the controlling principles involved and where a discussion of them could be found. With a friendly spirit and a noble generosity he has frequently shed light on the dark places and pointed the way to the proper course to pursue.

He was ever thoughtful and careful of his acts and words, and considerate of the feelings of others, and rarely, if ever, made an unkind or cutting remark. He was tender and sympathetic of those in sorrow or trouble, and ever ready to assist an erring friend or brother with good counsel and advice.

He was candid, truthful and upright in all his dealings with his fellow men. If he found that by inadvertence or through misinformation he had been led to do an act of injustice to another, none was more ready than he to make amends by correcting the error, and making the fullest possible reparation.

He lived a clean and blameless life, and always counseled clean and upright living by others. By precept and example he wielded a powerful influence for good in the wide circle of his acquaintance. In the fullest and truest sense of the term he was a good man. The world is better for his having lived in it, and those who knew and associated with him are better for that association. His good deeds will live after him. His life was a benediction. The ties that bound us so closely have been severed. We shall miss the kindly smile, the gentle greeting, the warm hand-clasp, but his life will be an inspiration and his memory cherished by us while life doth last.

HONORABLE A. W. JEFFERIS:

May It Please The Court: The death of Judge Reese terminated his personal activities, but not his influence, nor that of his works. If it were not for the lives of good and able men and their efforts in guiding and directing the efforts of their fellow men, the human family could make but little, if any, real progress.

The life of the departed was long, useful, and helpful. It was one of service. As a young man and member of the constitutional convention, he helped to construct the fundamental law for the commonwealth of Nebraska, his adopted state. As its district attorney in the early days, he performed faithful service to the people in an earnest effort to protect the lives and liberty of an increasing people and to make sure their property rights.

In the full maturity of his manhood, he directed his great intellectual attainments, his wise judgment and sterling insight to the performance of the delicate and trying duties of a judge of the highest court in his state.

He likewise gave his time and talent as Dean of the Law Department of the University in educating students of the law with high ideals and adequate legal training, to the end that the people of the various localities of the state might be counseled and advised in their efforts by lawyers of ability and honor.

A life of service such as was his is proof conclusive that the promptings of his heart led him to seek and help in the establishment of justice and right among his fellowmen, rather than to the accumulation of the world's riches for himself. His works will remain as guiding precedents. His character and standing is an honorable heritage for the members of his family. The bar and its members have the inspiration of his achievements to guide them in efforts to obtain the respect and encomium of those people who desire and wish that right and justice may be established and maintained for the well-being of mankind.

HONORABLE JOHN M. TUCKER:

May It Please The Court: The mark that the life of Manoah Bostic Reese made was as Judge of the Supreme Court, a lawyer in active practice, lecturer and dean of the law school, and as a leading citizen of his country.

His career as Judge of the Supreme Court was noted for sound and learned opinions that thoroughly digested the subject to a point where discussion was at an end. The opinions that he wrote in cases go far beyond a statement of the nature of the action, the evidence adduced, the contentions of the parties, and the holding of the court. When his opinions are before the student of the law who reads in preparation for the bar, or the lawyer who is examining authorities to cite, there will always be found a line of sound legal reasoning that is helpful in arriving at a conclusion of what the law is. His opinions always contained an argument in explanation of the reason for the holding of the court. Without this, an opinion is of very

little value to the student of the law or to the profession. He was possessed of broad sympathies, and these were at all times cultivated so that in applying legal principles to cases under consideration the weak were protected against the unjust attacks of the strong. In a decision of a case he never looked for a friend to reward nor any enemy to punish.

As a lawyer his ability was the result of a growth and development that was brought about by hard continuous work and labor in a study of the entire field of the law. He possessed a keen faculty to apply the knowledge obtained to the facts in the cases that came to his practice. In ability to raise points from facts in cases and to weave about his contentions a line of legal reasoning beyond successful attack he stood among the first. He was never swept off his feet by the forceful opposition of contending counsel. He was not afflicted with an irritating and tactless spirit of contention that excited antagonism in all with whom he came in contact, whether they were opposing counsel, judge, or jury. He was never rash or impetuous, or lacking in sound judgment and poise. He gave all of his best efforts to the practice of his profession, and was never disposed to postpone tasks of any sort. He never looked upon the practice of law as a matter of business. He did not regard the profession from the standpoint of money making, and therefore he never permitted himself to indulge in unethical practices. He always observed scrupulously his duty to the public, the courts, and his clients. Professional ideals were always first in his mind. Due to this high professional conduct, he always had the highest respect of the members of the bar.

HONORABLE CHARLES A. ROBBINS:

May It Please The Court: Others here today will speak of Judge Reese as lawyer, district attorney, member of the constitutional convention, Justice and Chief Justice of the Supreme Court, and citizen. I have thought that my close association with him for ten years in the work of the State University Law School entitled me to speak of him as a teacher of the law and of the influence of his teaching.

The State University Law School was established in 1891. Judge Reese was a member of the faculty from the beginning and delivered lectures on real property. For the most part instruction in the school was by lectures. There was little, if any, sequence in the courses of instruction. In the judgment of the board of regents the results were unsatisfactory. In 1893 it was ordered that text-books should be made the basis of instruction in the principal subjects, and Judge Reese was appointed Dean of the school. He held the office until 1903, a term of ten years. Nearly every advancement made in Nebraska in courses of law study, methods of instruction in law, requirements for graduation from the law school, and for admission to the bar of the state were made during that ten years. And very much of that advancement was due to his understanding, sympathy, and influence.

During the ten years of his office Dean Reese grew. His original opinions on some subjects were changed by experience and observation. He was not, in the academic sense, a product of the schools; but he acquired much of real finish by open-eyed and open-minded observation and study of results in the law school. That Abraham Lincoln had studied to advantage by tallow dip or open hearth such books as he was able to procure did not convince Dean Reese that the present day student should not read sytematically under an electric light. And, then, the supply of Abraham Lincolns seemed so very limited. And so Dean Reese favored the advancing requirements for admission to the law school, the change from the vague preliminary education sufficient to enable the student to understand the principles of the common law to the specific requirement of three years of high school work, and the change from three years of high school work to four years of high school work. The present standard of one year of college work was not effective until 1909.

It is now the settled conviction of most American law teachers that the ability to apply legal principles to concrete cases is best acquired by the study of the reported decisions of the courts. Such was not the opinion of most law teachers in 1893. And it was not the opinion of Dean

Reese at that time. When the case method of instruction was first used in the State University Law School, it was camouflaged under the term "text-book and cases," later changed to "cases and text-book." Dean Reese approved of the results. He had strong faith in good results. In 1902 every teacher in the law school (Dean Reese included) was using cases in class instruction, and some were using an out and out case method. What student of Dean Reese's day will fail to recall that his own instruction was illuminated from an inexhaustible collection of unforgetable special instances?

The three-year course of instruction in the law school was adopted while Judge Reese was Dean. And there have been very few important changes in the course of study in the intervening years.

I cannot but believe that what advancements have been made in the requirements for admission to the bar in this state have been made largely through the influence of the law schools. In 1893 there was no general educational requirement for admission to the bar in this state. The applicant for admission was required to pass a satisfactory examination in the principles of the common law under the direction of the court to which application was made. It was said that ability to distinguish between the Compiled Statutes and Maxwell's Justice Practice was satisfactory in some districts. Certainly no real tests were applied in most districts. The influence of Dean Reese was exerted strongly in securing the enactment, in 1895, of the statute placing the matter of admission to the bar in the exclusive jurisdiction of this court. It need hardly be said that he exercised an influence in the state legislature that no mere pedagogue could exercise. Dean Reese approved of the statute of 1905 requiring a three-year course of law study and general preliminary educational requirements, though at one time he came to doubt whether the legislature could be induced to pass the act.

Real liberty is equality before the law. To Dean Reese the courts of justice were the very flower of civilization. To him the calling of the lawyer was a high calling. Useful and right as are the rules of legal ethics, a mere peda-

gogue may recite them. But Dean Reese possessed those splendid qualities of uprightness, manliness, and bigness which made his daily presence and conversation in the class-room a telling influence for right living and conduct. He was himself a concrete case. At the bar of this state, and other states, his influence for good will long survive him.

HONORABLE JOHN LEE WEBSTER:

May It Please The Court: Manoah Bostic Reese, to whom we are this day paying memorial tribute, was one of Nebraska's most worthy and esteemed citizens.

He was a child of nature, a rustic youth, who developed strength, character and efficiency with the experience of years. In his long public service in various capacities, he proved himself to be an extremely useful man to the people whom he served.

As the elected representative from a farming community to the convention of 1876, Mr. Reese did effective and valuable work in helping to frame the Constitution under which the state has prospered during a period of forty-two years.

For six years he was prosecuting attorney in a judicial district which then included a dozen sparsely-settled counties which were not much more than open prairies dotted over with pioneer settlements and widely-separated villages.

In the early fifties, J. Sterling Morton, standing on a sloping hillside near where the village of Ashland now is, with a sweep of his hand, pointed to the valley of the Platte as the eastern boundary line of a vast desert region which extended westward to the far-setting sun.

Mr. Reese lived to see those counties become peopled with a numerous, thrifty, and industrious citizenship; the growing up of many and varied productive industries; the accumulation of millions of wealth, and the springing up of many cities therein which are like clustered gems evidencing the development and maturity of Nebraska's statehood.

From the vocation of a country lawyer in a little village, Mr. Reese was elevated to the honored position of one of the judges of the Supreme Court. Afterward, for a period of six years, he was a lecturer in the College of Law, and for ten years following was Dean of that department in the State University. At the end of that time, he again became a member of this court and was serving the people as Chief Justice at the time of his retirement.

From this brief summary, we see that Mr. Reese for nearly thirty-eight consecutive years served the people of Nebraska in some public or semi-public capacity. They respected him. They loved him. They honored him.

For a better appreciation of the life and character of Manoah Bostic Reese, permit me to make a hasty survey of his life, from the time and place of his birth to the end of his honorable career, that we may get into the atmosphere in which he lived, and observe the conditions surrounding him. Out of these conditions, like unto the lives of many other distinguished men, we can discover from whence came the innocent and sweetest thoughts of childhood which in time were succeeded by the vigorous energy and reflective qualities of strongest manhood.

Mr. Reese was born of pioneer parents in the prairie state of Illinois in 1839. That was long before the inventions and discoveries in the sciences which have subsequently produced the economical changes which have furnished the luxuries of modern day life. That was fifteen years before the Nebraska territory was created, and fifteen years before there were any permanent white settlements in this region west of the Missouri river.

Back in Illinois as a farmer boy, he lived close to nature; cultivated the soil; watched the fruit and the grain grow; and in the winter season occasionally attended a district school. His pleasures and opportunities were limited to those of the plain people who then inhabited that sparsely-settled country.

Out of the simplicity of those times, we can trace the beginning of the simple habits of life which remained with Mr. Reese as an ornament in future years. Again looking back to the peaceful times when Mr. Reese was but

a child playing on the prairie plains of Illinois, the United States had less than eighteen millions of people, yet Mr. Reese, broadening with time and influenced by his environment, lived long enough to be a part of the government when its population had grown to be more than one hundred millions of people, and to see the nation engaged in preparing an army of millions of soldiers to carry on its warfare with the central powers of Europe, in this the greatest cataclysm in history to make the world safe for republican forms of government.

The very extended panorama of interesting historic events which passed before his vision made lasting impressions upon his memory, and were stimulating influences in developing his strong and useful personal character, and caused him to become a close student of modern history.

In 1856 Mr. Reese removed from the prairies of Illinois to the prairies of the newer state of Iowa. It was after this pioneer farmer boy had reached the age of full manhood when his ambitions induced him to enter the doors of a seminary, and, later on, to engage in the reading of books in a law office; and in 1865 he received a license to practice law in the state of Iowa. We know but little more of him until we afterward find him in the village of Ashland in 1873, and in the town of Wahoo in 1874. The vast expanse of plains and rolling prairies had lured him westward. Longings for higher attainable things began to stir within him. Hazy glimpses of hitherto undreamed of possibilities began to shape themselves in his mind.

It might well be said of him that he was an example of the saying that nature is more perfect than all the artificialities of civilization, and a most efficient environment for the moral development of man. Thus only it is believed was it made possible for him to quicken and vitalize his powers to the fullest.

He came among us at a time when the chaos of a mighty world "was rounding into form the raw material of a state." The new country, with its new ideas and new questions, gave exhilarating energy to his body and mind. It may be well said of him that "he heard the tread of the

pioneers" moving westward over the prairie lands where soon would "roll a human sea."

In 1875 we find him among that group of sixty-nine men who framed the Nebraska State Constitution. This was an assemblage which, in proportion to the number of its members, contained in the growing more strong influential men who afterward arose to increased distinction and held more high offices of honor than any other single group of men of like number of which I have knowledge. Mr. Reese, in conscientious work, in careful investigation, and in faithfulness to duty, compared most favorably with his colleagues, and was recognized by all as one of the most valuable and useful members of that convention. He enjoyed the fiery, impulsive, combative debates of General Van Wyck. He listened with intense interest to the enthusiastic and inspiring eloquence of James Laird. He attended closely to the scholarly, dignified and cultured General Manderson.

From his experience in the constitutional convention, he recognized that governments are created by the union of fundamental elements of law woven into constitutional fabrics to control the body politic, and to preserve the mutual safety through the combined strength of the people. The proceedings of that convention were to Mr. Reese like a post-graduate course in constitutional law and in the science of government.

After all that may be said of Judge Reese, his chief reputation was made as a member of the Supreme Court. He was a patient and attentive listener. He had a retentive memory and was desirous of understanding all the intricate applications of the law. But the law is an immense subject. It is limited only by the boundary lines of human knowledge. It is a shield of protection for the richest and the lowliest, and holds the universe of men in one common embrace. As a judge of this court, he recognized that there are principles that are universal in the field of law, and that their application can be made to the countless conditions of life which are to be affected by them.

He had a vivid conception of the growth and development of the law. He had an appreciation of the aptness of the illustration, as expressed by another: "We may stand by the river and admire the great body of water flowing by, yet when we trace it back to its source we find a mere rivulet meandering on, joined by other streams, fed by secret springs and the rains and dews of heaven, but gathering strength and deepening its channels as it flows through the provinces until it attains its present majesty.

"Thus we can trace the principles of the law from small beginnings through gradual and countless contributions, until they finally take their places in use. * * * No such system can be born in a day; it is not as when nature in the full proportion of her strength suddenly lifted land into mountain ranges, but rather as by small accretions during countless ages, she places her islands in the seas."

Now and then we meet with instances of inharmonious joining of its principles which produce unsatisfactory results. These are not the faults of the law, but mistakes arising from an unfortunate application of its principles, or an erroneous judgment pronounced by those who administered it. It is the duty of the lawyer and the judge to ascend to that elevation of greatness from which he can comprehend the law as a science, and administer it as a philosopher. This Judge Reese always endeavored to do to the best of his ability.

Judge Reese was a man big enough to look at the facts in the record impartially, and to remember and apply the principles of the law uninfluenced by any heresy that might be popular for the hour. He was a judge ever ready to stand faithful to the fundamental truths of government and the sound philosophy of the law as he understood them. He realized that the "principles battled for at the bar in the passion of debate are merely re-echoed from the bench in unimpassioned utterance."

A person whom I do not know gave the following graphic and picturesque description of the Chief Justice at a time when he was sixty-nine years of age:

"The Chief Justice entered his private office in the state house one evening last week. He had spent the day

in the consultation room, communing with his colleagues. With a sprightly step he advanced to a table and laid down a calf-bound law book. His snow-white hair fell in cascades over his broad, high forehead. Keen, piercing eyes looked out from under bushy eyebrows. The forehead, eyes, nose and mouth suggested the recluse, the scholar, and the thinker, but the square aggressive jaw denoted the innate energy of an industrial field marshal." Judge Reese had something of the Quaker element in his composition, which was manifested by his silence, by his sincerity and his plainness; in his self-respect and respect for others; in his unconventionality and in his benevolence, his friendships and his deep religious nature.

In closing, I know no better phrase in which to express the whole life of Chief Justice Reese than to say of him that he was a child of nature. The effect of the environment of prairie land can be seen in the formation of his character and, in its extensive sweep of region, the expansion of his mental vision.

For his many friends, he always had a pleasant smile and a kindly greeting. At last he said to all of us "Farewell," and to the world "Good night."

CHIEF JUSTICE ANDREW M. MORRISSEY:

Realizing the important part that Judge Reese played in shaping the destiny of the state, and appreciating the high character and lovable disposition of the man, the court named this committee to draft resolutions expressive of the sentiments of its members. So well has the committee discharged its duties that I shall not undertake to add anything to what has been said.

The court adopts these expressions as its own. And, in order that they may be preserved as a lasting tribute to the memory of our departed friend, it is ordered that the resolutions presented and the speeches delivered be spread at length upon the journal of the court, and that they be published in our reports.

JUDGE CHARLES B. LETTON:

I fully concur with all that has been said with respect to the virtues of our departed friend. In addition, I wish

to say that there were two strongly marked traits of character of Judge Reese which deeply impressed me from my first acquaintance with him many years ago.

His pole star was right and justice. He would not knowingly wrong any man by word or deed. In every case brought to this court for review, he painstakingly sought to inform himself as to the facts and diligently sought to ascertain and apply the proper legal principles so as to reach a conclusion most in accordance with right.

Another trait of his character was his uniform kindness of disposition and amiability of manner. His courtesy was not a mere veneer. It came from his essential kindliness of heart and his good will to all mankind, and was but the outward expression of that inward condition. In this respect, as in others, he was "a gentleman of the old school," and yet he felt a stern devotion to duty. To paraphrase: "He was a man, take him for all in all, we may not look upon his like again."

JUDGE FRANCIS G. HAMER:

He was my friend. If he had faults they were but few, and I wrote them in the dust; when the wind blew they were gone. To us he is only a memory, although his work is all around us. As a lawyer, his inclination and experience made him an advocate. As a judge, he was careful, painstaking, and industrious; zealous to discover the correct rule of law, and fearless in declaring it.

I knew him from the time of his vigorous manhood until his tottering steps were nearing the boundary where eternity begins. I especially liked him because of his interest in young men. He was a teacher of young lawyers. He made them feel that he was their friend. He encouraged the best that was in them. The evidences of his work are with us, and they will continue down the ages, ceaseless as the centuries. He had the capacity and the art to make the young man understand that he was filled with the possibilities of useful citizenship. He made the future attractive by the promise of the bright things and the good things in store for the young man of enterprise and industry. He was much the friend of the student, and every student

knew it. He made no great pretense of learning, but he was strong. He had read much and had digested it.

The students who attended the law college at the State University are many of them in our state, many of them have gone to other states, and some of them are in the trenches across the water. Wherever these young men are, whether fighting the battles of their clients in the courts or fighting the battles of their country and of the democracy of the world, they are the better because they met Judge Reese, who widened their views of the law, of civilization, and of good government, and strengthened their patriotism and love of country.

Judge Reese stood for the betterment of mankind. He believed in rescuing and building up the unfortunate whom some mistake, perhaps some weakness, caused to wander from the path of honesty and to slip and fall. He did not believe that a man should be condemned and ostracised for the reason that he had once fallen and once violated the law. He believed that when the prisoner was liberated from the penitentiary he should be welcomed by those willing to throw a good environment about him, and to furnish him with honest employment, and to encourage him to live the life of good citizenship. He believed that most persons possessed good qualities, and that the misfortune of a mistake and a term in the penitentiary should not deny the man convicted from access to the opportunities of life. For many years he was president of the Nebraska State Prison Association. During that time he was the leader of that body in its attempts to rescue those who in their youth had slipped from the path of rectitude and had been adjudged to receive the punishment which properly comes to those who commit crime.

As a judge he was tender to those who had been tried and adjudged to be guilty and who had not received a fair trial. His vote was always in favor of a new trial for the prisoner who had been unjustly convicted and sentenced. He was in all such cases fair and full of courage.

I have never met a young man who was a student of the law school of which Judge Reese was the dean without feeling, when I talked with him, that the influence of Judge

Reese upon him had been for the best. I liked Judge Reese because be was full of manhood and tenderness. He was always useful, and the world will be the better because he did what he could to educate and to instruct the young of our profession and to lead them so that they went with unfaltering foot-steps toward the right. In his life he stood for morality, sobriety, and the best citizenship.

When the waves of time that beat forever on the mystic shore that lies beyond the range of human ken have borne and beaten all the boats and barks that sail their voyage on the sea of life beyond the fogs that hem our vision in, beyond the voiceless breakers of that silent shore to the harbor of the Great Beyond, then know the rising sun that lights and warms eternity both glints and cheers with all its golden beams the man who left us, carrying in his soul a flood of love and tenderness, of sorrow, of balm and charity for bruised and wounded hearts; for he stood for the poor, the weak, the fallen and distressed, and loved them all.

Safe in the care of Him who holds the sea within the hollow of his hand, who guards the navies of the world, its crowns and kingdoms and its marshalled hosts, the lonely home on desert, plain or forest solitude, the sleeping village, and the cities' teeming millions from storm and earthquake, pestilence and death, yet feels the pain of wounded bird and notes the sparrow in its fall, we leave our friend, himself so gentle, kind and true.

During the period covered by these reports, in addition to the cases reported in this volume, there were 43 cases affirmed by the court without opinion, and 144 cases disposed of by the supreme court commission.

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HOLT COUNTY FAIR ASSOCIATION, APPELLEE, V. HOLT COUNTY, APPELLEE: WILLIAM LELL ET AL., APPELLANTS.

FILED MARCH 16, 1917. No. 19058.

Agricultural Societies: ORGANIZATION: COUNTY AID. Where six persons only join in the organization of an agricultural society, such society is not entitled to an appropriation from the county general fund under the provisions of section 6, Rev. St. 1913.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Brome & Brome, W. G. Stewart and *C. H. Stowell,* for appellants.

A. J. Donohoe, J. J. Harrington and *W. K. Hodgkin, contra.*

MORRISSEY, C. J.

This is an appeal from the district court for Holt county. In 1913, 50 citizens of that county organized a county agricultural society in conformity with the statutes. In 1914 they held a three days' fair at O'Neill, the county seat. Application for county aid, under section 6, Rev. St. 1913, was made to the board of supervisors. The board made the allowance and ordered the issuance of a warrant for the proper amount. When this was done, William Lell and Charles Conarro gave notice of intention to appeal from the issuance of the county warrant, and filed an appeal bond. This action was then

brought by the Holt County Fair Association to compel the delivery of the warrant. The county of Holt is a nominal party, and stands ready to deliver the warrant. Lell and Conarro appear as taxpayers, but it develops that the real contention is that, years before the organization of the Holt County Fair Association, there was organized, at Chambers, an association called the South Fork Fair Association. From year to year this association held a fair at Chambers, and for a number of years the board of supervisors of the county gave it donations; or contributed aid, but not in the amount fixed by the statute. The South Fork Fair Association did not intervene, and is not a party. However, it is evident that this litigation is conducted in its interests, and its purpose is to secure the fund for the South Fork Fair Association. The section under which each party is claiming the right to the money provides that when 20 or more persons, residents of any county, shall organize themselves into a society for the improvement of agriculture and adopt a constitution and by-laws, and hold a fair of at least three days' duration, the county board shall order a warrant drawn in its favor, on the general fund, for an amount equal to five cents for each inhabitant of the county, based on the vote cast for member of congress. There is no question that the Holt County Fair Association organized strictly according to the statute, and held the three days' fair.

Six persons, in the year 1899, adopted what they call articles of incorporation of the South Fork Fair Association, and filed them with the county clerk and the secretary of state. When the board of supervisors was making its donations, or paying its bounty, from year to year to the South Fork Fair Association, it is evident that the board did not regard the association as entitled to the full five cents for each inhabitant, because the amounts paid varied all the way from $100 to $500 per annum. Chambers is located six miles from the south line of the county, and its nearest railroad station is O'Neill, 21 miles away. O'Neill is the county seat, has two railroads,

several hundred inhabitants, and is located close to the center of the county. Of course, it is the logical place for the county fair, but the matter of location is not controlling. If the South Fork Fair Association had complied with the statutes and perfected its organization first and held a county fair from year to year, it would be entitled to the fund provided by the statute. But its articles of incorporation show that but six persons joined in its organization. This was not such a compliance with the statute as entitles it to receive money from the county treasury.

The district court found that the Holt County Fair Association was regularly and duly organized, and conducted such a fair as entitled it to the money, and found specifically that the South Fork Fair Association had not been formed and organized in conformity with the statute, and that the money which had been paid to it from year to year by the board of supervisors was paid without authority of law. These findings are sustained by the evidence, and the judgment is

AFFIRMED.

CORNISH and DEAN, JJ., not sitting.

ALFRED PETERSON, APPELLEE, V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT.

FILED MARCH 16, 1917. No. 19172.

Appeal: CONFLICTING INSTRUCTIONS. It is erroneous to state to the jury by instructions that certain allegations of negligence set forth in the petition are to be considered by it in making up its verdict, and also to tell the jury that such allegations should be disregarded by them. Unless from the whole record it is apparent the jury were not misled thereby, the error must be considered prejudicial, since it is impossible to know which of the directions it followed.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Crofoot, Scott & Fraser, for appellant.

Jefferis & Tunison and *Hollister & Cunningham, contra.*

LETTON, J.

Action for personal injuries occurring by the plaintiff being knocked down and run over by an engine upon a railroad bridge. Plaintiff recovered a verdict and judgment for $10,000. Defendant appeals.

The plaintiff is a common laborer. Shortly before the accident he had been working on a farm in Nebraska. He went to an employment agent in Omaha, who directed him to go to Neola, Iowa, where he could procure employment on a stock farm belonging to one Hubbard. He arrived at Neola at about half past 5 o'clock in the evening of December 2, 1912. The accident occurred about 6: 25 P. M. He testifies that he inquired of the lady in charge of the station, and she directed him to Hubbard's residence. The evidence shows that for a short distance west of the station the railroad track and the railroad bridge crossing a small stream were very generally used by pedestrians. The bridge was floored and a hand-rail erected on both sides. The substance of plaintiff's testimony is as follows: He walked westward after he crossed the bridge until he met a passenger train coming in. Thinking he was mistaken in the direction, he turned and walked back toward the station. A little before he reached the bridge he heard a whistle; at the switch stand, which is east of the bridge about 35 feet, a man, whom he took to be a brakeman, was standing; that he told him he was looking for Mr. Hubbard, and that this man told him that Hubbard was in the stock-yards (which were north and west of this point), and said for him to go over the bridge to the yards. He then looked eastward, saw a train or car standing in front of the depot on the passing or switch track, but it had no lights. As he went to the stock-yards he stopped within one or two feet of the bridge and

looked back to see if the train was coming, but it was not moving, and he saw no headlight; when he reached about the middle of the bridge he was struck in the back and knocked down by an engine. It was dark at the time. He heard no noise and had no knowledge that the train was coming, or he would have jumped off the bridge. It is shown that his left leg was cut off, and that the heel and part of his right foot were crushed and afterwards removed. He remained in one hospital for about seven months, and about a year afterwards he was taken to another hospital, remaining there many months and suffering great pain. The bridge had been used as a pathway for many years to the knowledge of defendant's employees, a beaten track leading to and from it. There were no signs or notices forbidding persons to use the same. The bridge at that time was 13.2 feet in width, and there was a space of 16¼ inches between the engine and the hand-rail on the side of the bridge. The west end of the station building is 298 feet east of the east end of the bridge. The main line is the first track south of the station platform, and the passing track on which the engine and freight train stood is the next one south.

Plaintiff testifies he could see the station when he turned and looked back before going onto the bridge, and also saw a car on the south passing track. The switch point is 35 feet east of the bridge. It is shown that the engine was uncoupled from the train and moved forward on the side-track at the rate of two or three miles an hour until the switch stand was reached. After the switch was opened it moved forward on the bridge at about the same rate for the purpose of clearing the switch, so as to back onto the main line to be used in moving cars at the rear end of the train. There is a slight curve in the track, so that the beam from the headlight would be directed north and west of the bridge until after the engine emerged from the side-track. Neither the engineer nor fireman saw the plaintiff, and they did not know he was on the track until they heard him scream. The engine was stopped immediately, and

he was found lying on the bridge toward the south end of the track between the tank and engine. At the rate the train was moving, according to the testimony, about eight or ten seconds elapsed between the time the headlight shone on the track on the bridge and the time the plaintiff was struck. There is a direct conflict between the testimony of plaintiff and that of a number of witnesses for defendant as to whether there was a headlight burning upon the engine and as to whether any signals were given. Although he says he heard no whistle, we think it is established that two short whistles were blown before the engine moved, as a signal to a towerman stationed about 600 feet east of the bridge, who answered by a signal light, allowing the train to go upon the main line. The only direct testimony that no headlight was burning is that of the plaintiff, though two other witnesses say they did not notice it. The positive testimony of the engineer, fireman, conductor, two brakemen, the towerman, and that of two farmers, who were at the stock-yards at the time, is that the headlight, which was an oil burner, was burning before the accident occurred, and at the time plaintiff was struck. In such a state of the evidence, where there is so much doubt as to the existence of negligence on the part of defendant, it is especially needful that the instructions be clear and unequivocal.

Since the evidence is clear and undisputed that the defendant company had permitted the bridge to be used as a passageway for pedestrians for many years, and this use was well known to its agent and employees, the plaintiff was not a trespasser, but occupied the status of a licensee. This being the case, defendant was bound to use ordinary and reasonable care to see that a traveler crossing the bridge was not injured by its negligence.

The petition alleges, in substance, that the defendant invited the plaintiff and the public generally to use the bridge as a public way, and that the accident to plaintiff was, among other things, due to "negligence of said defendant in keeping and maintaining said bridge as a

passageway for the use of pedestrians without sufficient space between the tracks and railings thereof," and its negligence in failing "to provide any signal or watchman at said bridge to give people warning that were using the same."

Instruction No. 2 given by the court is as follows: "You are instructed that the burden of proof is upon the plaintiff herein to establish, by a preponderance of the evidence, all of the material allegations of his petition, which are not admitted by the defendant's answer, before he will be entitled to recover in this action. That is to say, it is for him to establish:

"(1) That defendant was negligent in one or more of the particulars with which it is charged in said petition, namely, that defendant was negligent in maintaining the bridge in question as a public passageway for the use of pedestrians without sufficient space between the tracks thereon and the railings thereof to afford reasonable safety for pedestrians to pass over said bridge at the same time the defendant's engine and tender were passing over the same, and, under such circumstances, in the defendant running its engine and tender over and upon said bridge while plaintiff was thereon; or that defendant was negligent in operating its engine and tender over or upon said bridge while plaintiff was thereon, without giving any signal or warning of its approach, and striking and injuring plaintiff at a time when plaintiff was unable to protect himself, and when defendant's servants in charge of said engine and tender saw, or by the exercise of reasonable care should have seen, the plaintiff in time to avoid injuring him; or that the defendant was negligent in failing to provide some signal or watchman stationed at said bridge to warn persons of the danger incurred in crossing said bridge.

"(2) That such negligence of the defendant was the proximate cause of the plaintiff's injuries, while the plaintiff himself was in the exercise of ordinary care for his own safety; but, on the question of ordinary care on the part of the plaintiff, it is sufficient, in the first in-

stance, if the evidence adduced on behalf of the plaintiff does not disclose negligence on his part directly contributing to the happening of the accident complained of; and,

"(3) That plaintiff has sustained some damages by reason of said injuries and the amount thereof.

"Should you find that plaintiff has established each and all of the foregoing propositions by a preponderence of the evidence, and should you further find from the evidence that plaintiff was not guilty of contributory negligence, as hereinafter defined, then plaintiff would be entitled to recover such damages as the evidence shows he has sustained as the natural and direct result of the defendant's said negligence, and your verdict should be for the plaintiff accordingly.

"Should you find, however, that plaintiff has failed to so establish any one or more of the foregoing propositions, or should you find that the evidence upon any one or more thereof be evenly balanced, or that it preponderates in favor of the defendant, or should you find from the evidence that plaintiff himself was guilty of contributory negligence, then plaintiff will not be entitled to recover herein, and your verdict should be for the defendant."

The court in instruction No. 1 restated all the allegations of negligence in the petition. Instruction No. 2 states that it is for plaintiff to establish that the "defendant was negligent in *one or more* of the particulars with which it is charged in said petition." The first charge made is that defendant was negligent in maintaining the bridge without sufficient space between the tracks and the railings to allow pedestrians to pass over the bridge at the same time while the engine and tender was passing. Another charge is that the defendant "was negligent in failing to provide some signal or watchman stationed at said bridge to warn persons of the danger incurred in crossing said bridge." By the third instruction the jury were told that they must be satisfied "that the defendant was guilty of negligence in *one or more* of the particulars with which it is charged in the petition,

and which are more specifically set forth in the first subdivision of instruction number 2 herein."

These instructions permit a verdict to be rendered against the defendant merely for the reason that the bridge as constructed was not wide enough to permit foot passengers and engines or trains to pass over it at the same time with safety. This is not a correct statement of the law. The fact that the defendant suffered or permitted the use of this bridge for foot passengers for so long a time implies a license to use the same, but it did not impose upon it any duty to change the construction of the bridge. The bridge was apparently absolutely safe for the purposes of the railroad company, and with due regard to the fact that a narrow railroad bridge, even though planked over, is always a place of danger, the bridge was apparently perfectly safe for foot passengers except when a train or engine was crossing. The license to the public was a license to use the bridge in the condition as it then stood, and no duty was imposed upon the defendant to make the bridge sufficiently wide so that foot passengers and railroad trains could pass over it at the same time. And so with the allegation that it was negligence to fail to keep a watchman at the bridge, the evidence did not establish such a constant use of the bridge by pedestrians as to impose such a duty upon defendant.

After reciting these and the other allegations of negligence in the petition, the court says: "Should you find that the plaintiff has established each and all of the foregoing propositions by a preponderance of the evidence, and should you further find from the evidence that plaintiff was not guilty of contributory negligence, as hereinafter defined, then plaintiff would be entitled to recover such damages as the evidence shows he has sustained as the natural and direct result of the defendant's said negligence, and your verdict should be for the plaintiff accordingly." It is true that by the eleventh and twelfth instructions the jury were told that the railroad company would not be liable for injuries

occurring to a licensee merely and solely because of the narrowness of the space between the track, or the engine or cars upon the track, and the railings on the bridge, and that there was no duty upon it to maintain a watchman at the bridge, but it is impossible to tell whether the jury followed these or the first, second and third instructions. It was error to give such conflicting instructions, which tend to confuse the jury. *Wasson v. Palmer,* 13 Neb. 376; *School District of Chadron v. Foster,* 31 Neb. 501; *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1; *Williams v. McConaughey,* 58 Neb. 656; *Reed v. State,* 75 Neb. 509, 521; *Bryant v. Modern Woodmen of America,* 86 Neb. 372.

In the state of the pleadings and evidence in this case, it is especially important that the instructions be clear and unequivocal. In a number of cases we have held that the giving of conflicting instructions, although erroneous, is not always prejudicial, and we adhere to these views. Whether prejudicial depends upon the circumstances in each particular case. The main thing is that the reviewing court be satisfied that the defeated party has had a fair trial of the real issues. Unless it is so convinced, the error must be deemed to be prejudicial. We are of opinion that the rule announced in the cases above cited should be applied and the giving of these conflicting instructions be held to be prejudicial. Upon a retrial only such allegations in the petition and such issues as are supported by evidence should be submitted to the jury.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., not sitting.

IN RE ESTATE OF JANE A. DOVEY. GEORGE OLIVER DOVEY ET AL., APPELLEES, V. GEORGE E. DOVEY, APPELLANT.

FILED MARCH 16, 1917. No. 19223.

1. **Wills**: SETTING ASIDE: UNDUE INFLUENCE: BURDEN OF PROOF. When it is shown that a will has been signed and attested by the statutory number of witnesses, and it is conceded that the testator was of sound mind, the will is presumed to be valid. In order to set it aside on the ground that it has been procured by undue influence, competent proof is required, and the burden of proof is ordinarily upon the contestant.
2. ———: PROBATE. If the facts in evidence justify the belief that the instrument was the result of the volition and expressed intentions of the testatrix, that the disposition of her property is not opposed to natural justice or contrary to or opposed to the usual considerations which move reasonable minds in such matters, and that it may as well have been the result of love and affection as of influence, solicitation or coercion, a finding is justified that the will expresses the true intention of its maker.
3. ———: EXECUTION: PROOF. The due and proper execution of a will may be proved by the testimony of the attesting witnesses, even though the attesting clause is excluded from the consideration of the jury.
4. ———: PROBATE: TRIAL: WITHDRAWAL OF EVIDENCE. It is within the discretion of the district court to admit or reject evidence of declarations made by the testatrix some four or five years before the execution of the will to the effect that she did not intend to make a will, and under the evidence in this case it was not prejudicial to withdraw such testimony from the jury.
5. ———: ———: VERDICT: SUFFICIENCY OF EVIDENCE. Where the evidence in behalf of the contestants tending to establish the existence of undue influence is specifically denied by the witnesses for the proponents, a verdict that the will was valid will not be disturbed for lack of evidence.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

John L. Webster, for appellant.

C. A. Rawls, contra.

LETTON, J.

This is a contest over the probate of the will of Jane A. Dovey. The contestants allege that the testatrix, by reason of old age and weakness caused by continued illness, was not possessed of sufficient mental capacity to make a will, and that at the time it was made she did not understand its contents. It is also alleged that it was executed by reason of improper and undue influence exerted upon her by E. G. and G. O. Dovey, her grandsons, who are the sole devisees in the will, and by their parents and other members of the family of H. N. Dovey; that, by reason of her great age, weakness and mental condition, she was easily influenced and her mind was poisoned against the objectors, her sons, George E. Dovey and Oliver C. Dovey, without cause or provocation, and she was thereby deprived of her free will and agency. The will was executed on April 24, 1913. At that time Mrs. Dovey was 86 years of age, was suffering to some extent from enlargement of the arteries and from severe pains in the back of her head, and, while able to walk about the house, she was so infirm that she had to be carried up and down stairs. She died November 20 of the same year. She was totally blind for several weeks before her death and her eyesight had been failing for some months, but there is no evidence to show that at the time the will was executed she was not fully competent to make a will. For some months after the date of the execution of the proposed will she read the daily papers, conversed intelligently, was interested in current events and in local happenings, and showed no signs of mental incompetency. Mrs. Dovey had three sons, George E., Horatio N., and Oliver C. Dovey. Prior to 1909 these brothers had carried on a mercantile business in Plattsmouth, which was started by the father E. G. Dovey, and after his death was still continued under the name of E. G. Dovey & Son. In 1909 dissension arose among them and litigation ensued, but the evidence is undisputed that each of the sons and

their families maintained pleasant relations with the grandmother until her death. For 25 years after the death of her husband she lived in the family of her son Horatio and continued to live there until the time of her death. Testimony was introduced to show that several years before, on at least two occasions on being spoken to with reference to disposing of her property by will, she said she would not make a will, that her deceased husband was opposed to wills, and that she would not make one. This evidence was taken from the consideration of the jury by oral and written instructions of the court as being too remote. The will contains a provision charging the legatees with the maintenance and support of their mother "of the character to maintain the station in life which she has always occupied." The proponent E. G. Dovey testified that his grandmother requested him to go to Omaha to have the will prepared for her, telling him what disposition she wanted to make of her property; that he went to Omaha and had the proposed will prepared by a lawyer of that city, and that when he returned he gave the will to his grandmother. This was on April 19, 1913. On April 24 Mr. Walling, a friend of the family, was called to the home at the request of Mrs. H. N. Dovey, proponent's mother. He testifies that he went upstairs to the room where Mrs. Jane E. Dovey was sitting. She handed him the paper, and at his suggestion she named two friends whom she desired to act with him as witnesses to the will. These ladies were then called by telephone. When they arrived Mrs. Dovey told them that the paper she had was her will, signed it in their presence, and asked them to sign as witnesses, which they did. They each testified that she appeared to be of sound mind and competent to act. A short time before this George E. Dovey, the oldest son of Mrs. Dovey, had procured a will to be prepared by which his mother devised all her property to Mr. Horatio N. Dovey, the father of the proponents, or to Horatio and himself, as to which the record is not

quite clear. He gave this proposed instrument to Horatio Dovey and asked him to have it executed by his mother, but this was never done. In May, 1913, he also procured a bill of sale of his mother's property to be made conveying it to Horatio and himself, and asked Horatio to have his mother sign this. Soon afterwards it was returned to him by Horatio, who testifies he never presented it to Mrs. Dovey. George E. Dovey testifies that he then took the bill of sale and went to Horatio's home to see his mother. That Mrs. H. N. Dovey accompanied him upstairs to Mrs. Dovey's room. When he presented the bill of sale Mrs. Dovey refused to sign it, saying she would sign no more papers, and Mrs. H. N. Dovey said that "mother has signed about all the papers she had ought to sign." Mrs. Dovey denies making this statement.

The testimony is undisputed that the writing of the proposed will and its execution was not communicated by E. G. Dovey or his mother, Mrs. H. N. Dovey, to any other member of the family until after Mrs. Dovey's death, when Mr. Walling was called by Mrs. H. N. Dovey, given the key to Mrs. Jane E. Dovey's bureau, and asked to get the papers. He found the will in an envelope, as he had sealed it and indorsed it on the day he had executed it. It was filed for probate that day.

The testimony of Mrs. Patterson, a daughter of George E. Dovey, that every time she went to visit grandmother Dovey she was never left alone with her, but some member of the family of H. N. Dovey was present, is directly contradicted by Mrs. H. N. Dovey. Testimony that Mrs. H. N. Dovey some time before told Mrs. Oliver C. Dovey, "I tell you I have got grandma now where she does just what I say," is also contradicted by Mrs. H. N. Dovey. At the hearing the contestants offered no evidence as to Mrs. Dovey's soundness or unsoundness of mind, and did not bring her sanity into question, so that the only matter in issue between the

parties is as to whether the execution of the will was brought about by undue influence.

The first assignment of error is that the court erred in permitting several witnesses for the proponents to testify as to the mental capacity of Mrs. Dovey to make the will. At the trial the contestants admitted that Mrs. Dovey was mentally competent to make a will at the time the instrument was executed, hence this complaint was waived. Moreover, there is ample testimony on this point to support the will.

The second assignment of error is that the court erred in refusing to permit the contestants to prove by Mr. Walling that the will was not read to Jane A. Dovey. This exclusion was on cross-examination. The witness had just testified twice on direct examination that the will was not read over to her before she signed it, and that all he knew about it was that she made the statement that she had read it.

The third assignment of error is that the court erred in admitting the will without the attesting clause. Since the proof of execution was sufficient otherwise, this was not essential. *Monroe v. Huddart*, 79 Neb. 569. The fourth and sixth have reference to the exclusion of evidence. The same facts were established by other testimony, and there was no prejudicial error in the rulings complained of.

It is complained that the court erred in refusing an instruction to the point that undue influence may be exercised by one not a beneficiary under the will. Instruction No. 9 expressly told the jury: "Proof of undue influence may be circumstantial and inferential, and the influence may be that of a third person as well as that of a direct beneficiary under the proposed will, or by both in conjunction." There is no ground, therefore, for this complaint.

It is insisted in assignment No. 10 that the court erred in its instructions Nos. 7 and 8, relating to what constitutes undue influence and the degrees of evidence necessary to sustain the charge of undue influence.

The seventh and eighth assignments of error are that the court erred in withdrawing from the jury by oral and written instructions statements and declarations of Mrs. Jane A. Dovey that she had not made and did not intend to make a will. That George E. Dovey himself placed little weight upon these declarations is evidenced by the fact that before this will was executed he endeavored to procure a will drawn by his own attorney to exclude his brother Oliver from a share in the estate, to be executed by his mother. This will was given to Horatio to be presented to her. This he never did. While we are satisfied the evidence might properly have been received, it was so remote in point of time that its admission or rejection lay within the discretion of the district court, and it was not prejudicial error to withdraw its consideration from the jury.

Counsel for appellant are in error with respect to the scope of the instructions. The court did not withdraw from the jury the declaration, which George testified was made in May after the will was signed, to the effect that she had signed her name to all the papers she was going to sign. In cases of this nature declarations made by the testatrix within a reasonable time prior or subsequent to the making of the will, material to the inquiry, may be considered upon the question of undue influence. We are satisfied that no error would have occurred if this testimony had been admitted in the discretion of the district court, but we are also satisfied that no prejudicial error occurred by its exclusion. The proof shows that these remarks were made more than four years before the will was executed, and before controversy and litigation arose between the three sons arising out of their relations as partners in the business of E. G. Dovey & Son. It was after this time that the relations between Oliver and his brothers George and Horatio became strained and dissension arose. Under the circumstances it is not strange that Mrs. Dovey changed her mind. The fact alone that she

devised her property to her two grandsons, for whom she had love and affection, was not an unnatural or unusual disposition of her property, or enough to convince an unprejudiced mind that the will was the result of undue influence.

After stating that the contestants alleged that there was undue influence used upon Mrs. Dovey, which resulted in her signing the proposed will, against her intention and against her real wish and will, and that it devolved upon the contestants to so prove by a preponderance of the evidence, before the jury would be warranted in finding the proposed will invalid for that reason, the court said in instruction No. 7: "In this connection you are instructed that the term 'undue influence' means such influence as compels or induces a person to do that which is against her real wish and desire, either from fear, desire for peace, or from some feeling which at the time she is not able to control. What would amount to undue influence in one case and vitiate a will of a testatrix would not necessarily be so considered in another case. In that regard every case stands or falls upon the peculiar facts and circumstances surrounding it, as the same may be established by the evidence. In any case, however, the undue influence necessary to vitiate a will must be such as to amount to moral force destroying the free agency of the testatrix and substituting another person's will for her own. There must be proof that the purported will was obtained by such undue influence and that the circumstances of its execution are inconsistent with any other hypothesis but undue influence."

Instruction No. 8 is as follows: "You are instructed that not all influence exerted upon a testatrix on the making of her will is undue or unlawful. Lawful influence arising from legitimate family and social relations may produce irregularities in the disposition of property which may work an apparent hardship, but neither advice, argument or persuasion so bestowed will avoid a will made freely and from convictions held

by the testatrix, although such convictions be the result of such advice, argument or persuasion. To render influence undue it must subvert the free agency of the testatrix."

It is strenuously insisted that instruction No. 7, in so far as it states that "undue influence necessary to vitiate a will must be such as to amount to moral force destroying the free agency of the testatrix and substituting another person's will for her own," and that "there must be proof that the purported will was obtained by such undue influence and that the circumstances of its execution are inconsistent with any other hypothesis but undue influence," is an erroneous statement of the law. It is conceded that these ideas are first found in the jurisprudence of this state in *Latham v. Schaal,* 25 Neb. 535. It is said that the language is found in the syllabus and not in the body of the opinion, and was, therefore, prepared by a reporter and not by the court. But the reporter's note at the beginning of the volume states that the syllabi in this volume were prepared by the judge writing the opinion, in accordance with rule 18, and the practice of this court for very many years has been to make the syllabus as much the decision of the court as the opinion itself. Like statements of the law in instructions were approved in *Seebrock v. Fedawa,* 30 Neb. 424, 437, opinion by Norval, J., and cases from Wisconsin, Ohio, New York and Michigan are cited in the opinion to sustain the proposition; in *Boggs v. Boggs,* 62 Neb. 274, opinion by Pound, C.; in *Stull v. Stull,* 1 Neb. (Unof.) 389, opinion by Oldham, C., and in concurring opinion by Pound, C., p. 399; and in *Spier v. Spier,* 99 Neb. 853. Practically the same theory is stated in *Knox v. Knox,* 95 Ala. 495. And in *Schieffelin v. Schieffelin,* 127 Ala. 14, an instruction that, in order "to set aside a will of a person of sound mind for having been obtained by undue influence, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue in-

fluence," but "it must be shown that they are inconsistent with a contrary hypothesis, and the undue influence exercised in relation to the will itself," was held proper.

There can be no doubt that, where there is testamentary capacity, a finding that undue influence has been exerted will not be supported merely by evidence that some person had an opportunity to exert or was possessed of influence over the testator. It must be made to appear, where there is no express evidence, by a justifiable and fair inference from the facts proved that such influence was exerted so as to dominate and control the will of the testator, and caused a testamentary disposition to be made of his property other than that which he would have made if uninfluenced. An inference of undue influence which induced the testator to do that which he would not otherwise have done must be established by a preponderance of the evidence and must exclude any reasonable inference. *Schuchhardt v. Schuchhardt,* 62 N. J. Eq. 710. Almost the exact language of the instruction complained of was used by the Lord Chancellor in *Boyse v. Rossborough,* 6 H. L. (Eng.) *2, *50.

In *Latham v. Schaal, supra,* the language is credited to the case of *Maynard v. Vinton,* 59 Mich. 139. In a later case, *Bush v. Delano,* 113 Mich. 321, it is said that this language stated an incorrect rule, that the proof to establish undue influence need only amount to a preponderance of the evidence. A Missouri case is to the same effect. *Gay v. Gillilan,* 92 Mo. 250.

We are content to abide with the law as formerly announced, and hold that the instruction is not erroneous as applied to the facts in this case.

It is contended that the fact that the execution of this will was kept a secret from the sons of Mrs. Dovey until after her death is a strong indication of the exercise of undue influence. E. G. Dovey testifies that he saw the will prepared by an attorney at the instance of George E. Dovey and delivered to his father,

in the bank, and thinks he read it. It would be human nature, knowing the desire of his uncle George to have Mrs. Dovey, the testatrix, execute a will making a different disposition of her property, to keep the knowledge of the actual will from him in order to avoid any attempt on his part to change the disposition of the property. The close business relations existing between his father and George E. Dovey probably kept E. G. Dovey and his mother from telling his father, Horatio N. Dovey, of the will. The other legatee was not aware a will had been executed until after the death of his grandmother.

Taking the evidence as a whole, we are convinced that it supports the verdict of the jury. At the time Mrs. Dovey made the will the three sons were apparently each possessed of a competency. The two young men to whom she left her property had been born and grew up in the home where she resided. A strong bond of love and affection existed between them. It is a well-known fact that grandparents are more indulgent and more apt to overlook the faults of their grandchildren than their own parents are. Mrs. Dovey was a woman of strong mind. Her intellectual capacity was unimpaired at the time the will was made. There is no evidence of any restraint or compulsion being brought to bear upon her or that she was deceived in any way. She lived in full possession of her mental faculties for months after the will was made, and never at any time manifested a wish or desire to change it; on the contrary, she stated to her son George in response to his request to sign a conveyance of her personal property that she would sign no more papers. Knowing the relations between her three sons as she did, we think there was nothing unnatural or suspicious in the fact that Mrs. Dovey gave to her grandsons her estate, imposing upon them the duty of caring for their mother in whose home she had lived so many

years. We find no prejudicial error in the record, and the judgment of the district court is

AFFIRMED.

SEDGWICK and HAMER, JJ., dissent.

WILLIAM A. COLE, RECEIVER, APPELLEE, V. C. E. ADAMS, APPELLANT.

FILED MARCH 16, 1917. No. 19183.

Banks and Banking: ASSESSMENT OF STOCK: SET-OFF. The value of property owned by a stockholder of an insolvent national bank and delivered by him to the receiver under an agreement that it should be credited on any assessment subsequently levied upon his stock may be pleaded as a set-off in an action to collect a stock-assessment, where the receiver refused to return the property and used the proceeds to increase the assets for the benefit of creditors.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed.*

Stubbs & Stubbs, for appellant.

Dexter T. Barrett, H. H. Mauck and *Bernard McNeny, contra.*

ROSE, J.

This is an action by the receiver of the insolvent First National Bank of Superior against a stockholder to recover a stock-assessment of $16,862.50, defendant having owned 168.62½ shares and the comptroller of the currency having ordered an assessment of $100 a share. The answer of defendant contained detailed statements, alleging in substance that he owned promissory notes of the value of $8,799; that he turned them over to a temporary receiver under an agreement that they should be used, if necessary, in liquidating the bank's indebtedness, in such an event their value to be credited on any stock-assessment subsequently levied upon defendant's stock; that the receiver has re-

fused to credit defendant with the proceeds of the notes, but has converted them to the use and benefit of the bank's creditors; that the assets of the bank were sufficient to pay all of its indebtedness; that in any event an assessment of $50 a share would be sufficient, and that therefore the order of the comptroller for an assessment of $100 a share was invalid. For the value of the notes defendant sought credit on the assessment, if valid; if invalid, his prayer was for the return of his property or the proceeds. A demurrer to the plea of set-off was sustained. From a judgment in favor of plaintiff for $17,652, defendant has appealed.

The ruling on the demurrer is presented for review. Defendant contends that the comptroller's order for the assessment does not conclude a stockholder, but may be reviewed in equity, and that, since an equitable defense is available in an action at law, the set-off was a proper plea.

The decision of the comptroller, as a general rule, conclusively determines the necessity for, and the amount of, a stock-assessment. *Kennedy v. Gibson,* 8 Wall. (U. S.) 498; *Rankin v. Barton,* 199 U. S. 228. The comptroller's order does not, however, conclusively determine the liability of a stockholder in a suit against him to collect the assessment. *Moss v. Whitzel,* 108 Fed. 579; *Welles v. Stout,* 38 Fed. 807.

In the case last cited it was held that, in an action to recover an assessment from a stockholder, a set-off for a claim of defendant was properly pleaded, where he "would be entitled to receive the full amount before distribution by the receiver to general creditors." The defendant therein was allowed to set off against the assessment a fund created for a specific purpose amounting to a trust.

According to the answer in the present case, the notes pleaded as a set-off were the individual property of defendant. They were not assets of the bank at the time the receiver took charge of it. They were not available for the payment of general creditors of the bank. The notes were delivered to the temporary receiver for a specific purpose. The proceeds of the notes have been used by the receiver for

the benefit of creditors of the bank. These are circumstances under which a stockholder is entitled to protection by means of a set-off. Plaintiff contends that the power of the receiver is limited, and that defendant was bound to take notice of the limits of his authority. *Ellis v. Little,* 27 Kan. 707. The receiver, however, has retained the notes and the proceeds have been used for the benefit of the bank's creditors.

Plaintiff relies upon *Witters v. Sowles,* 32 Fed. 130. In an action to collect an assessment it was alleged in the answer that, while the bank was in a failing condition, property was delivered to it under an agreement with its officers and the bank examiner that, in case of a failure, the property should be applied upon a stock-assessment. A set-off was denied, the court saying:

"This assessment is for the purpose of paying those who were creditors of the bank at the time of its failure. That property went to pay others not creditors at the time of the failure, so far as it did pay them. The delivery of the property may have created a liability of the bank; if so, the assessment upon this and the rest of the stock would go ratably upon that and the other liabilities if proved and established. A set-off cannot be made without depriving others of their ratable proportion. Besides this, the claims are not in any sense mutual. The claim of the executor, if he has any, is against the bank. The assessment never was due to the bank, and does not belong to it. The assessment belongs to the creditors of the bank, and is recoverable by the receiver, only for the purpose of ratable distribution among them. * * * This claim is therefore no answer to the claim for the assessment, whether this understanding was had or not, or with the bank examiner or only with others. There was no receiver, and the examiner did not, and probably did not assume to, represent the creditors."

The case may be distinguished. In the present case the agreement was made with the receiver after the bank failed. Defendant's claim is against the receiver and does not deprive the bank's creditors of assets to which they are en-

titled. The proceeds of defendant's property have increased the assets available for the payment of creditors of the bank at the time of its failure.

The district court erred in sustaining the demurrer to the plea of set-off. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

SANDHILL LAND & CATTLE COMPANY, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 16, 1917. No. 19321.

Judgment: REVERSAL: INVALID STATUTE. A judgment based on a void act of the legislature will be reversed, if properly assailed, on appeal.

APPEAL from the district court for Grant county: JAMES N. PAUL, JUDGE. *Reversed.*

Byron Clark, Jesse L. Root, J. W. Weingarten, F. A. Wright and *D. F. Osgood,* for appellant.

E. H. Boyd, contra.

ROSE, J.

This is an action to recover damages prescribed by statute for delay in the transportation of live stock. Rev. St. 1913, secs. 6018, 6019. From a judgment in favor of plaintiff for $400, defendant has appealed.

The invalidity of the statute under which the action was brought is pleaded as a defense. Since the appeal was taken the statute has been declared unconstitutional. *Davison v. Chicago & N. W. R. Co.,* 100 Neb. 462. On authority of that decision, the judgment of the district court is reversed and the cause remanded.

REVERSED.

SEDGWICK, J., not sitting.

IN RE ESTATE OF LOGAN ENYART.
KATHERINE ENYART, APPELLEE, V. ALBERT F. ENYART, APPELLANT.

FILED MARCH 16, 1917. No. 19168.

1. **Executors and Administrators:** SPECIAL ADMINISTRATOR: APPOINTMENT: APPEAL. The special administrator provided for by section 1381, Rev. St. 1913, has entirely different duties from those imposed upon a special administrator appointed under section 1341, Rev. St. 1913. The latter section provides that "no appeal shall be allowed from the appointment of such special administration." This provision does not apply to the administrator appointed under section 1381. From the appointment under section 1381 an appeal is allowed by the general provision for appeals from orders of the county court.
2. **Partnership:** DEATH OF PARTNER: SPECIAL ADMINISTRATOR: APPOINTMENT. A special administrator to settle with the surviving partner of the decedent is authorized by section 1381, Rev. St. 1913, only when such surviving partner is also the executor or administrator of the decendent's estate; that is, the general executor or administrator having charge of the property of the decedent, including the residuary estate.
3. ———: ———: ———: ———. In such case, if the surviving partner is executor of a will disposing of only a part of the estate, and there is also a general administrator for the whole property including the residuary estate, such general administrator must settle with the surviving partner, and no special administrator is allowed for that purpose.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed with directions.*

George W. Berge and *L. F. Jackson,* for appellant.

Paul Jessen and *W. H. Pitzer, contra.*

SEDGWICK, J.

Logan Enyart died in Otoe county in November, 1912. He left two separate, distinct wills. Each disposed of certain property specified therein. He also left a considerable estate not disposed of by either of these wills. He and his

brother, Albert F. Enyart, were partners in business and as such in their partnership business had a considerable amount of property. By one of the wills he devised his interest in this partnership property to his brother, Albert F. Enyart, with the provision that his brother should pay to Katherine Enyart $5,000. Katherine Enyart was the widow of Logan Enyart, and after the death of the decedent it was contended that there was an antenuptial contract between Logan and Katherine Enyart, by which she barred herself from any right or interest in the property of the decedent. It was afterwards determined that this alleged contract was invalid, and that Katherine Enyart was entitled to participate in the property of her deceased husband as his widow. *In re Estate of Enyart*, 100 Neb. 337. She renounced all claims under the wills, and elected to take as the widow of her deceased husband. By the will which gave the decedent's interest in the partnership property to his brother, his brother, Albert F. Enyart, was nominated as executor, and was afterwards duly appointed as such by the county court of Otoe county, and H. D. Wilson was duly appointed general administrator of the estate not disposed of by these two wills. An application was made to the county court of Otoe county for appointment of a special administrator under section 1381, Rev. St. 1913. That court entertained the application and appointed a special administrator. From this order an appeal was taken to the district court for Otoe county. A motion was made to dismiss the appeal on the ground that no appeal was allowed. The appeal was dismissed by the district court, and from that order dismissing the appeal, an appeal has been taken to this court.

1. The first question then presented is whether an order appointing a special administrator under sections 1380 and 1381 is appealable. Those sections are as follows:

Section 1380. "The executor or administrator of a deceased partner shall settle with the surviving partner all the dealings and transactions of the partnership, as well as those remaining unsettled before the death of the deceased

partner, as of the said parties thereafter, and shall present to the county court appointing such executor or administrator a full statement of the matter and manner of such settlement, and upon due notice to all parties interested, the said court shall examine, review, correct, approve, or disallow such settlement. But if the said legal representatives of such deceased partner and the surviving partner cannot agree upon such settlement, the accounts of the dealings and transactions of the partnership shall be settled as heretofore."

Section 1381. "In case the executor or administrator of a deceased partner be also his surviving partner, the county court appointing him shall appoint a special administrator to discharge the duties herein provided, and his powers shall be limited thereto. Such appointment shall be made upon the same proceedings as are provided by law for the appointment of special administrators, when there is delay in the granting general letters testamentary or of administration."

These sections were enacted by the legislature of 1883. Laws 1883, ch. 39. The title of the act is: "An act providing for selling the interests of a deceased partner and settling the accounts between him and his surviving partners." The administrator provided for in section 1381 is called a special administrator, and his duties are limited to settling with the surviving partner all the dealings and transactions of the partnership, and his powers are limited to those duties. It is in that sense that he is a special administrator. His duties continue during the entire time of the settlement with the surviving partner. The special administrator contemplated in section 1341 is only appointed temporarily while there is a delay in granting general letters, occasioned by an appeal or from some other cause. If an appeal could be taken from his appointment, there would in the meantime be no one to preserve or care for the estate. Hence the provision that in such case no appeal shall be allowed, but this consideration does not apply to the appointment of an administrator to settle with a partner of the de-

ceased, who is also general administrator of the estate. Section 1341, Rev. St. 1913, after reciting that a special administrator may be appointed when there is a delay in granting letters, occasioned by an appeal or from any other cause, provides: "No appeal shall be allowed from the appointment of such special administration." This provision forbidding the appeal applies only to "such special administration" as is provided for in that section. The district court was, we think, in error in dismissing this appeal.

2. The appellant contends that the conditions existing in this case did not authorize the appointment of a special administrator. It is perhaps unusual that a man makes two distinct wills, and still leaves a large portion of his property intestate. If a surviving partner is also "executor or administrator of a deceased partner," ordinarily he has full control of his deceased partner's estate. Section 1380 requires the executor to settle with the surviving partner of the decedent. If the same man is both a surviving partner and executor or administrator of the decedent's estate, it would be impossible that he should, as executor, settle with himself as surviving partner. But this is true only when he is general executor or administrator, and as such has custody and control of the residuary estate. This is the condition provided for in section 1381. The section uses the definite pronoun *the*, "In case *the* executor or administrator," and in the light of the other statutes this section should not be construed as though it read "In case any executor or administrator." These two wills, being special and not covering the whole estate, the executor of each of these wills is in a sense himself a special executor, and not *the* executor of the deceased partner's estate. The general administrator of this estate is H. D. Wilson, and he is not the surviving partner of the deceased. It is clear that the legislature did not intend that section 1381 should apply in such a case. The administrator, that is, the general administrator, who administers the residuary estate, is fully authorized, under these statutes, to settle with the partner of the decedent,

and it follows that no special administrator for that purpose was necessary or authorized by the statute. This general administrator will protect the interests of the widow, Katherine Enyart, and will "settle with the surviving partner all the dealings and transactions of the partnership." It is the duty of the surviving partner to see that the debts of the partnership are paid, and that the widow obtains such interest in the partnership property as the law gives her, and it is the duty of the general administrator to see that he does this, and to settle with him, representing those who are interested adversely to the surviving partner in the partnership property, if any.

The judgment of the district court is reversed and the cause remanded, with instructions to enter an order reversing the order of the county court.

REVERSED.

STATE OF NEBRASKA, PLAINTIFF, V. SUPREME FOREST, WOODMEN CIRCLE, ET AL., DEFENDANTS.

FILED MARCH 16, 1917. No. 19761.

1. Insurance: FRATERNAL ASSOCIATION: DECREE: ENFORCEMENT. When this court has taken jurisdiction of the affairs of a mutual beneficiary society at the suit of the state by the state insurance board, and has entered a judgment and restraining order, then it is the duty of this court to see that its judgment is effective and is not violated by the parties.

2. ———: ———: ———. In the judgment heretofore entered in this case it was intended to preserve the affairs of the defendant society *in statu quo* as far as practicable until the governing body, the supreme forest, can interpret and, if necessary, amend its laws and regulations. In the meantime the general administration of the affairs of the society is committed to Mrs. Manchester, as supreme guardian, and those who are associated with her.

3. ———: ———: INJUNCTION: VIOLATION. Until such action by the supreme forest, complaints of violations of the orders of this court, or complaints of misdemeanors of officers in connection with the affairs of the order, must be addressed to this court.

PROCEEDING for contempt and injunction. *Injunction allowed.*

Willis E. Reed, Attorney General, for plaintiff.

John J. Sullivan, Arthur F. Mullen, Stout, Rose & Wells, and *John B. Barnes,* of counsel, for Emma B. Manchester.

Jefferis & Tunison, Brogan & Raymond and *Frank H. Gaines,* for Dora Alexander *et al.*

SEDGWICK, J.

After the decision was entered in this case on the 19th of December, 1916, 100 Neb. 632, it appears that the parties continued the controversy, and some of the defendants who were enjoined by that decision afterwards complained against Mrs. Manchester to the executive council. This executive council, it will be remembered, consists of 13 members, of which a majority of 7 are disputing with Mrs. Manchester as to the authority to conduct the affairs of the society. The executive council then, by these 7 members, appointed a committee "to investigate the actions and transactions of the supreme guardian and make report." That committee, on the 16th day of February, 1917, reported articles of impeachment against Mrs. Manchester. This report is quite voluminous, covering about 18 sheets of typewritten matter, and embraces 11 or 12 specifications of alleged ground for removal. Thereupon Mrs. Manchester filed in this case a complaint against the 7 members of the supreme executive council charging them with contempt of court in attempting to remove her from the office of supreme guardian in violation of the orders and judgment of this court, and charging that they have conspired "to circumvent, defeat, and make a nullity the judgment entered by this court." She asked that they be enjoined from further proceeding in that matter until her complaint could be heard and a final order entered therein. Upon this complaint the defendants complained of were cited to show cause why they should not be punished for contempt, and a temporary order of injunction was issued. Affidavits were

filed by the contending parties and oral arguments were heard.

In our former decision it was determined: "The authorities of the state, under our statute, are given such control of fraternal beneficiary associations as to require the state to see that the interests of the members of the association are not sacrificed by unauthorized usurpations of authority on the part of officers of the association. Under the circumstances in this case, this court has original jurisdiction of an action in the name of the state brought by the attorney general, in behalf of the insurance board, to determine the jurisdiction and powers of the contending officers of the association." And in the opinion it was said: "There is more or less ambiguity and uncertainty in the articles of association and the by-laws, and, even if we assume that all parties have acted in good faith, it is apparent that these uncertainties have led to this destructive conflict of authority." It appeared that there was "an irrepressible conflict" between rival factions in this society that endangered the usefulness of the society, if not its very existence. The intention was to determine that it was the duty of this court on the complaint of the state authorities to take jurisdiction of this controversy and of the affairs of the association, and take such measures as the law provides to determine the controversy and protect the endangered interests of the membership. It was said that the law required such societies to have a representative form of government, and to this end they must have a governing body with supreme authority to control and regulate all of its affairs, and that this governing body must be freely selected directly or indirectly by the members of the society. It was found that in the main the differences between the contending factions arose from irreconcilable interpretations of the constitution and laws of the society, and that further radical and definite action was necessary on the part of the governing power, the supreme forest. It was intended to maintain the *status quo* as it existed when this action was begun as far as practicable until the governing body could act and

adjust the differences. The contention between the factions was so radical and in some respects so unreasonable that it was at one time thought that it would be necessary to place the affairs of the association in the hands of a receiver; but, as Mrs. Manchester and those associated with her had for so many years managed the affairs of the society and apparently with some considerable degree of credit, it was thought best, if possible, to continue that management until the supreme forest should act. In this view of the matter there is no doubt that in the meantime it was the duty of this court to see to it that its judgment should be effective, and that neither faction should be allowed to take such action as might endanger the existence of the society or seriously embarrass its work. When, during the pendency of the action in this court, a majority of the executive council attempted to remove Mrs. Manchester from the office of supreme guardian, it was determined, and we suppose so understood by all parties, that the rival and contending faction should not be allowed to determine the whole controversy by assuming the exclusive control of the affairs of the association. If Mrs. Manchester, as supreme guardian, should be found to be violating the orders of this court while the court has jurisdiction of the affairs of the association, or if she should be guilty of mismanagement of the affairs of the society so that it would become necessary to remove her from its management, application should be made to this court for that purpose. There is a general provision in the laws of the society that the executive council shall, when the supreme forest is not in session, have power to remove defaulting officers; but they are to report their proceedings to the supreme guardian, and some action in the premises by that officer seems to be required, so that there was perhaps some question as to whether it was intended by their laws that such power of removal should include the supreme guardian. At all events, such comprehensive powers could not be entrusted to the rival faction in this controversy while the disagreement between these factions was being adjudicated by the

courts. It is intimated in the proofs offered by the defendants in answer to the citation for contempt that the supreme guardian and some of her influential appointees are sacrificing the interests of the society in an attempt to control or influence the election of members to the supreme forest. Such practices, it is said, sometimes obtain in politics; but it is unfortunate indeed if such methods are used in these beneficiary societies. The supreme forest has a large membership. Its members are selected from all parts of the country, and this court cannot presume that it will, when convened, be under the control of selfish and corrupt influences. The thousands of interested members of the society in all parts of the country must be aware that it is in their interest as well as their duty to be informed in regard to the affairs of the society and to choose intelligent and honorable and disinterested members of this controlling body of their organization. Political differences must be submitted to the electorate, even though there may be danger that the individual voters will be imposed upon and misinformed, and there seems to be no other remedy in this case than to submit these differences to the membership of the association through their supreme forest in the hope and expectation that the voting membership will intelligently perform their duties.

The so-called articles of impeachment against Mrs. Manchester as supreme guardian, upon which the executive council was about to act when this citation was issued, contained 12 specifications. The first is as to the appointment of an attorney for the society. It is alleged in this specification that Mr. Burnett was supreme attorney prior to July, 1915, and that after the executive council had adjourned in July, 1915, the supreme guardian requested Mr. Burnett to resign and appointed Mr. Price, and the executive council in February, 1916, "concluded not to continue Mr. Price as attorney for the order, and selected Mr. Gaines for a period of five months," and that notwithstanding Mrs. Manchester had taken counsel with her attorney and had been advised that she did not have the power to

appoint the attorney, and had upon that advice recognized Mr. Gaines as attorney, and had presided at the meeting of the executive council at which Mr. Gaines was appointed and had participated in that appointment, still the supreme guardian in December, 1916, entered into a contract with Mr. Price as supreme attorney and attempted to dismiss Mr. Gaines as such attorney "that she may have her own appointee who will be subservient to her will as supreme attorney," with other details as to the controversy in regard to the attorneyship. The specification ends with the charge: "We accordingly charge the supreme guardian with violating the laws of the order and the rules, regulations and directions of the supreme executive council in her attempt to oust the supreme attorney from his office and to employ W. B. Price as attorney for the order contrary to its laws and the rules, regulations and directions of the supreme executive council." Mr. Gaines' communication to the council, which inaugurated the removal proceedings, contains the statement: "It is necessary that the four officers, namely, the supreme guardian, the supreme clerk, the supreme physician, and the supreme attorney, must work in harmony, because each has independent duties to perform which are absolutely necessary to the continuance and preservation of this order." In our former opinion we said that the matters in controversy between these rival factions appear "to include the appointment of financial and other agents and attorneys, and other important matters." It is manifestly necessary that these four officers named in Mr. Gaines' statement should be able to act together in harmony, and as Mrs. Manchester and those who were acting with her appeared to have generally been in control of the affairs of the society when the rival faction began their attempts to take over that control, which condition continued substantially to the commencement of this action, it seemed to be absolutely necessary in the interests of the society that that condition should continue until the supreme forest would take final action making the powers and duties of the respective parties plain

and adjusting the whole controversy. This specification in regard to the attorneyship is the leading and perhaps the most important in the whole charge.

Another specification is that the supreme guardian without authority waived the payment of the $1 certificate fee required upon each application for beneficiary membership. This $1 fee goes to the general fund of the order, and it seems that the regulations make no provision for waiving it. This waiving of this fee caused, as is alleged, a loss to the order of "many hundreds of dollars." It seems that the regulations provided for another fee of $5 to be paid upon each application, and that the supreme guardian is authorized to waive the payment of this fee, but should not have made her order so general as to cover the $1 fee also. If Mrs. Manchester had personally profited by the waiving of this $1 fee, it would be an indication of corrupt practice; but, as there was no profit to her apparently in the transaction, it might possibly be considered as a mistake on her part. In view of our general conclusion as to the right of these respective factions to remove each other from all connection with the society while the matter is pending before this court, we will not regard it necessary to analyze these extensive charges. In the main they appear to relate to transactions prior to the commencement of these proceedings, or at least prior to the judgment heretofore entered herein; and, without determining whether any of the matters charged against Mrs. Manchester are of so serious a nature as to require this court to take action thereon, it is sufficient to say that they have not been brought to the attention of this court in such a manner as to require investigation. We are not determining which of these factions has the greater (or perhaps we should say the lesser) merit. The affairs of the society must be administered while we are awaiting the action of the governing body, and we are committing the administration to those authorities that have so long managed the business, believing that it is better to do so, unless and until it is made to appear that a receiver is necessary.

It appears that the rules of the order provide that the supreme guardian shall call a special meeting of the supreme forest upon request of the executive council. Since this citation was issued, such request has been made to Mrs. Manchester. The request specified the time and place of holding the meeting. An application was made to this court for an order requiring the supreme guardian to call the meeting for the time and place specified by the executive council, and proof was tendered which it was claimed showed that fair dealing and the ends of justice required that the supreme forest should convene at the time and place fixed by the council. But as the laws of the order were indefinite on that point, except as they required the supreme guardian to call the meeting, and so might be understood to place the responsibility upon her, and as there was such a radical difference between the factions upon this as upon all other questions, it was thought best to refer this contention also to the supreme forest itself. If the supreme guardian should name an unsuitable or improper time and place for the supreme forest to meet, that body will have ample power to correct the error.

Until the meeting of the supreme forest, matters must continue as nearly as practicable as they now are. If the supreme guardian, or members of the executive council, should in the meantime violate the orders of this court, or should wilfully convert or unlawfully dissipate the funds of the society, or be guilty of any other wilful misdemeanor in connection with the affairs of the order, complaint should be made to this court. Upon such complaint the court will take measures to determine the facts in relation thereto, and also whether such complaint is made without probable cause, and will make such order in the matter as the circumstances require. We find that the proceeding and attempt to remove Mrs. Manchester from the office of supreme guardian is in violation of the former judgment of this court; but as these defendants were acting under the advice of eminent counsel, members of the bar of this court in whom we have great confidence, and as our find-

ings and judgment heretofore entered were not as formal and comprehensive as they might have been, we cannot find that the defendants have been guilty of an intentional and wilful disobedience of the injunction heretofore allowed, and no other penalty will be imposed than to require the individual defendants in this citation to pay the costs of this hearing.

The preliminary injunction upon this citation is made permanent, and the costs upon this citation will be taxed against the defendants therein.

INJUNCTION ALLOWED.

ROSE, J., not sitting.

STATE, EX REL. ALBERT S. WHITE ET AL., APPELLEES, V. JOHN H. MOREHEAD ET AL., APPELLANTS.

FILED MARCH 16, 1917. No. 19911.

Mandamus: REMEDY AT LAW. The action of the state banking board in granting or refusing a bank charter is reviewable by petition in error in the district court. This affords a complete and adequate remedy for any error of that board in such matters, and mandamus to compel a different action cannot be maintained.

APPEAL from the district court for Lancaster county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

Willis E. Reed, Attorney General, Dexter T. Barrett and *Charles S. Roe,* for appellants.

Lambert, Shotwell & Shotwell and *Morning & Ledwith, contra.*

SEDGWICK, J.

The first question presented in this case is whether mandamus is the proper remedy, and that depends upon whether the relator had a complete and adequate remedy by petition in error to review the order of the state banking board in refusing to grant the charter. Under the opinion of this

court in *Mathews v. Hedlund,* 82 Neb. 825, and *Munk v. Frink,* 75 Neb. 172, and various other decisions of this court, some of which are cited in the two cases above referred to, there can be no doubt that the action of the state banking board can be reviewed by petition in error filed in the district court.

The question then is whether the review by petition in error in such case is an adequate and complete remedy. Section 7880, Rev. St. 1913, provides: "Any person or officer, or the presiding officer of any board or tribunal before whom any proceeding may be had, shall, on request of any party thereto, settle, sign, and allow a bill of exceptions of all the evidence offered or given on the hearing of such proceeding." Section 8177 provides the procedure. This would seem to give the applicants for a banking charter the right to have the evidence taken down and a bill of exceptions settled by the state banking board. If that was done and the evidence with the petition in error filed in the district court, the district court would proceed exactly as it would upon a writ of mandamus, if that was the proper remedy; that is, it would determine whether the board had committed any substantial and reversible error. If the record showed that the board had exceeded its jurisdiction or power, or if it showed that in the exercise of its discretion the board had abused its discretion to the prejudice of the plaintiff in error, the order of the board would be reversed. The statute provides that the order, if found erroneous, "may be reversed, vacated or modified by the district court." Under this power the district court would affirm or reverse the order of the banking board, and, if the order was reversed, would determine what order should have been made, if that could be determined upon the record presented, and certify to the banking board with instructions to enter the order that should have been entered. If the record was insufficient for that purpose, the matter would be remanded for further proceedings. This remedy would be complete.

In this case the proper practice is discussed in the briefs, and it is insisted that mandamus is not the proper remedy. It is the general rule in all courts that mandamus cannot be used when there is a complete and adequate remedy provided by statute. The important question of the construction of the statute, and the power of the banking board to refuse a charter solely because it may find that the banking facilities in the locality where it is proposed to use the charter applied for are already adequate, is determined in *State v. Morehead,* 100 Neb. 864, and it is not necessary to discuss that question here.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

HAMER, J., concurring in part and in the conclusion of dismissal.

According to the syllabus in the majority opinion, the action of the state banking board in denying an application for a charter is reviewable by petition in error in the district court, and if denied in that court an appeal may be taken to this court, and mandamus to compel the board to issue the charter is held not to be the proper remedy.

In *Munk v. Frink,* 75 Neb. 172, it was held: "By section 580 of the Code the district court is given jurisdiction to review, by proceedings in error, an order of the state board of health revoking the license of a physician."

In *State v. Hay,* 45 Neb. 321, it was held: "The power conferred upon the governor to remove certain public officers for cause is an administrative and not a judicial function, and orders made in the exercise of that power are not reviewable by the courts." It was held in that case that the office of governor was an administrative and political office, and that it was not judicial, and that a hearing had before the governor to remove the incumbent of the office of state superintendent of the asylum for the insane at Lincoln could not be reviewed in the courts. Governor Holcomb heard charges against Dr. Hay and removed Dr. Hay

from the office which he held as superintendent of the asylum. Dr. Hay tried to review the proceeding before Governor Holcomb, but he was unable to bring about any result. He came to this court to review the proceedings against him. Judge Post, delivering the opinion of this court, said: "The conclusion reached, although not expressed in the case cited (*State v. Smith*, 35 Neb. 13) was, that such power is in its proper sense an administrative rather than a judicial function, and that orders made in the exercise thereof are not reviewable by the courts; and a re-examination of the subject at this time has confirmed that conclusion. * * * It is sufficient that the conclusion above stated is in accord with the decided weight of authority and supported by the more satisfactory reasoning"—citing a large number of cases. If that doctrine is to be applied, there is in this case no remedy except mandamus. There can be no review by petition in error except where the proceeding sought to be reviewed is a judicial proceeding.

Section 580 of the Code reads: "A judgment rendered, or final order made, by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court." Notwithstanding what is said touching the case where Dr. Hay was removed from the office of superintendent of the asylum, there are plenty of decisions to the effect that the action of the officer attempting to exercise the functions of a court or quasi-judicial functions are subject to review by petition in error based upon a statement of the issues involved and the evidence preserved in a bill of exceptions.

Does a review of the merits of the case justify the conclusion that it ought to be dismissed?

Sections 280-345, Rev. St. 1913, contain the act concerning banking. Section 295 provides that, after the examination and approval by the banking board of the statement provided for in section 294, the corporation shall file with the state banking board the oath of the president or cash-

ier that the capital stock has been paid in as provided by section 292, and then that the state banking board shall issue the certificate provided for in section 293 and the charter, and this is to be done if the state banking board is satisfied that the parties are parties of integrity and responsibility. It would seem clear that that question is for the determination of the board. In the instant case the banking board does not seem to have been satisfied with the leading promoter in the scheme of organizing the new bank. Governor Morehead, a member of the board, seems to have testified that he was opposed to the promotion of banks. He thought that the creation of banks should come about through voluntary action. As to himself he was inclined to adopt the view that he might be prejudiced against White, who was active in the promotion of the proposed new bank. It seems that the board engaged one Van Horn to investigate Mr. White, the leading promoter in the organization of the proposed bank. Van Horn reported that White had been a justice of the peace in South Omaha; that he had worked at the real estate business in Kansas City; that he was instrumental in the organization of a bank at Chadwick, Missouri, and that he later organized the Night and Day Bank of St. Louis, capitalized at $200,000, and that White went in as president of the bank, and was president for something more than a year. Mr. Van Horn reported that White was well educated, exceptionally bright, and a good promoter, and not dishonest, but that he had been unfortunate in some of the enterprises which he had organized; that he had been in debt and unable to pay, but had subsequently paid what he owed.

Van Horn's report is complimentary to Mr. White, but it at the same time showed that Mr. White had charged large promotion expenses and had been successful in collecting them. There was enough in the report of Mr. Van Horn, and also in the testimony of Governor Morehead and Mr. Royse, to make it a matter of uncertainty as to whether it was advisable to issue a charter to Mr. White and those associated with him. It is for the banking board to

determine the question as best it may concerning whether the parties who apply have "integrity and responsibility." It is not a question for us to determine whether the board rightly decided upon the question which it had before it. If it had a question to decide, and there is evidence enough in the record to show that it had, then that question can only be reviewed by bringing the evidence before us in such a manner that we may properly consider it. There was no proceeding in error from the action of the banking board to the district court for Lancaster county. It was an application for mandamus, and it is well settled that in an application for mandamus there cannot be a review of the testimony for the purpose of correcting errors in the proceedings of the original tribunal. It will be seen that the case does not regularly come to us after being reviewed in the district court on a petition in error from the proceedings of the banking board.

Where one of these various boards, of which there are still many in this state, has heard a case and has made a finding of fact permitting only one conclusion, which it hesitates to declare, there should be no delay upon the part of the courts to use the remedy which mandamus alone provides by compelling it to announce a decision which it is clearly its duty to make and about which it is no longer permitted to exercise discretion. A familiar illustration of the use of mandamus is furnished in cases where officers refuse to declare the result of an election. *Strong, Petitioner,* 20 Pick. (Mass.) 484; *Kisler v. Cameron,* 39 Ind. 488; *Munk v. Frink,* 75 Neb. 172; *State v. City of Lincoln,* 68 Neb. 597.

While, if there was nothing to decide, there would be a clear right to compel action of the board by mandamus, yet in the instant case there was something to decide. It is still undecided. We could not review the decision of the banking board until it was first properly reviewed in the district court upon appeal or error. This court will not by mandamus, attempt to control the discretionary powers of

another tribunal so that they shall be exercised in a particular way. *State v. District Court,* 2 Neb. (Unof.) 385.

"The writ of mandamus will not issue merely to correct errors; it must further appear that the remedy prayed for by the application for the writ can be obtained by that means only and as a last resort, and that the relator has no adequate remedy in the due and ordinary course of the law." *State v. Jessen,* 66 Neb. 515.

The action of the state board of equalization may be reviewed in the district court by a petition in error. *State v. State Board of Equalization and Assessment,* 81 Neb. 139.

Where mandamus is sought to compel the performance of a plain and unqualified duty concerning which the officer is vested with no discretion, the writ will command the doing of the very act itself. *Humboldt County v. County Commissioners of Churchill County,* 6 Nev. 30.

The fact that the party aggrieved by the nonperformance of official duty has a remedy by an action against the officer upon his official bond will not prevent the courts from lending their aid by mandamus to enforce the duty; the remedy upon the bond being inadequate. *State v. Dougherty,* 45 Mo. 294.

In *State v. Francis,* 95 Mo. 44, it was held that mandamus would issue to vacate an order of a police board directing the chief of police not to interfere with the sale of wine and beer on Sunday.

"In contested proceedings for the revocation of a physician's license to practice medicine, * * * if it appears that the state board of health has acted within its jurisdiction, and that all of the jurisdictional facts essential to uphold its final order are sustained by some evidence competent for that board to consider, its orders will be upheld in error proceedings in the district court, and on appeal to this court." *Mathews v. Hedlund,* 82 Neb. 825.

I agree to the conclusion that the case should be dismissed, but upon the merits, and not because of a mistake in the procedure.

OTTO BEINDORFF, APPELLANT, V. PAUL ANTHES, ADMINISTRATOR, APPELLEE.

FILED MARCH 16, 1917. No. 19205.

Wills: CONTEST: QUESTION FOR JURY. In this, a contest over the probate of a will, the evidence is examined, and, there being no testimony supporting the allegation of undue influence, the court properly withdrew that question from consideration by the jury.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

W. J. Connell and *Herbert J. Connell,* for appellant.

Weaver & Giller, contra.

CORNISH, J.

The trial in the lower court resulted in a verdict for the proponent of the will in question. This appeal is taken to vacate the judgment rendered on the verdict.

The error assigned is the instruction of the trial court that the evidence did not support the allegation of the plaintiff that the will was made under duress and through the undue influence of Mrs. Burnett, the daughter of the deceased, Charles Beindorff, with whom she lived for some months previous to the making of the will and for over 7½ years afterwards, when he died at the age of 85 years. He left an estate variously estimated at from $20,000 to $70,000. He bequeathed the bulk of his estate to Mrs. Burnett; $1,000 each to her two children; $500 each to the children of his deceased son, Charles F.; the same amount to the two eldest children of his son Otto, the contestant; nothing to his grandson Charles; and $1 to Otto. So far as the evidence shows, he was on good terms with his grandchildren and had always helped the families financially. The testimony is somewhat conflicting as to his relations with his son Otto. Otto was given to strong drink and was frequently in financial distress. The will recites that Otto has "re-

ceived advances from my estate in excess of his distributive share." The evidence shows that the father supported Otto and his wife for four years while they were in Europe, the former studying music, and that he also helped his son Charles in business enterprises, and lost money advanced. According to testimony of certain witnesses, the deceased had said that Charles had received advancements equal to his distributive share. There is evidence showing that when Otto could not get money from his father he would sometimes become very abusive. This testimony is denied. In a letter to his sister, Otto solicits her aid in securing $50 "to avoid a cussing from Pa and excitement to you."

As bearing upon undue influence, Adolph Holz, who worked in the family in 1907, a year after the will was made, testifies that when Otto wanted to borrow a dollar to buy coal Mrs. Burnett objected, but her father permitted Otto to have a sack of coal. According to this witness, she would prevent her father from giving Otto money. The witness Ish testifies that Mrs. Burnett told him that she had to manage the business, and that when she asked or required her father to do anything he would do it. When asked if he had ever known deceased to comply with any order or direction his daughter gave him, the witness replies: "He would do what she said, and did do it." He also testifies that after the will was made, in a conversation he had with her, she anticipated litigation over the will. When these conversations occurred, the evidence does not disclose. The witness also testifies that, from 1900 on, the deceased failed mentally and physically, so as not to be mentally competent to transact business. This issue of fact was submitted to the jury, which found against the contestant.

It is unnecessary to go further into the details of the evidence. While the jury might believe from the evidence that the will was unfair, there appears to be an entire absence of evidence of the exercise of undue influence on the part of Mrs. Burnett, connected with the execution of the will and operating at the time it was made; that at the time the testator's mind was so overmastered that her will was sub-

stituted for his. While the intentional exercise of undue influence, destroying the free agency of the testator, may be shown by circumstantial evidence, it is not sufficient to show merely that the person may have power to unduly overbear the will of the testator. The evidence must go further and show that by the exercise of that power the will was, in fact, procured. Mere suspicion, conjecture or guess that undue influence has been exercised is not sufficient. In *Boggs v. Boggs,* 62 Neb. 274, this court used language as follows: "The burden is upon the contestants to establish undue influence, and in so doing it is not enough to show that the circumstances attending execution of the will are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis."

Finding no error in the record, the judgment of the district court is

AFFIRMED.

HAMER, J., dissents.

MAY TANNER, APPELLANT, V. FLORENCE M. DEVINNEY, APPELLEE.

FILED MARCH 16, 1917. NO. 19776.

1. **Appearance:** SPECIAL APPEARANCE. The appearance of the defendant in an attachment case to challenge the jurisdiction of the court over his person or property, because the plaintiff has not been a resident of the state for six months preceding the attachment, is a special and not a general appearance, and does not, of itself, give the court jurisdiction to proceed with the trial on the merits.
2. **Constitutional Law:** RIGHT OF ACTION. The provision in section 7732, Rev. St. 1913, as amended in 1915 (Laws 1915, ch. 145), requiring plaintiff to have been a *bona fide* resident of the state for not less than six months preceding the filing of the petition, is not unconstitutional as violative of section 2, art. IV, of the federal Constitution, which provides that citizens of each state shall be entitled to all of the privileges and immunities of citizens of the several states.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

Lee O. Carter and *Edwin Falloon,* for appellant.

Jean B. Cain and *Alvin E. Evans, contra.*

CORNISH, J.

This is an action sounding in tort, the plaintiff attaching the defendant's property on the ground of nonresidency. When notice for service by publication was complete, the defendant appeared specially as follows:

"The defendant, appearing specially and for the purpose of this motion only, and for no other purpose, moves the court to quash and set aside the service of the writ on said defendant, and the return thereof, for the reason that the attachment herein was not properly granted, it not being shown to the court that the plaintiff has been a resident of this state for at least six months preceding filing the petition, and is not in compliance with the statutes of this state relative thereto, and for the further reason that this court has no jurisdiction over the person of said defendant."

This motion was sustained and the action dismissed.

Error is claimed on two grounds: First, that the statute, which permits attachment in case of tort only when the plaintiff has been a resident of this state for six months, is inimical to section 2, art. IV of the federal Constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states; and, second, that the special appearance, above quoted, amounts in fact to a general appearance.

Giving the motion its broadest scope, it does not seem that the defendant appeared, or intended to appear, for any other purpose than to challenge the jurisdiction of the court over her person or property. Such a motion well taken entitles the mover to a quashing of the writ. The statute requires six months' residence in the state by the plaintiff as a jurisdictional fact. It is very possible that

where the particular condition or status of the plaintiff is made a jurisdictional fact in the law, it could not be dispensed with by the litigants. However that may be, we hold that the motion invoked no power of the court beyond those which were proper to the motion.

We are of opinion that the provision for six months' residence does not make the law unconstitutional. It touches residency, not citizenship. It would apply as well to a citizen of this state who is not a resident at the time as it would to a citizen of another state residing here. It is like the law which requires nonresidents to give security for costs. Such discrimination between resident and nonresident plaintiffs may be based upon reasons of public policy. Our courts should not be vexed with litigation between nonresident parties over causes of action which may arise outside of our territorial limits. The federal provision refers only to those privileges and immunities which grow out of citizenship, those which are in their nature fundamental rights belonging to the individual as a citizen of the state. Its object is to secure to the citizens of every state an equal administration of justice as it regards their essential right either of property or person by the courts of every state, and is not intended to interfere with the mode of prosecuting those rights.

For cases bearing upon this question, see *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315; *Central Railroad & Banking Co. v. Georgia Construction & Investment Co.*, 32 S. Car. 319; *Cummings v. Wingo*, 31 S. Car. 427; *Kincaid v. Francis*, 3 Tenn. 49; *Chemung Canal Bank v. Lowery*, 93 U. S. 72; *McCready v. Virginia*, 94 U. S. 391; *Frost & Dickinson v. Brisbin*, 19 Wend. (N. Y.) 11; *Davis v. Cleveland, C., C. & St. L. R. Co.*, 217 U. S. 157, 18 Am. & Eng. Ann. Cas. 907; *Coffman v. Brandhoeffer*, 33 Neb. 279, 284; *Harkness v. Hyde*, 98 U. S. 476.

AFFIRMED.

SEDGWICK, J., not sitting.

RUTH MCHENRY MORRISON, APPELLEE, V. ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT.

FILED MARCH 16, 1917. No. 19145.

1. **Garnishment:** JURISDICTION. The plaintiff, a citizen of Iowa, brought an action by attachment and garnishment in this state, alleging personal injuries sustained in Iowa against the defendant, an Illinois corporation; the garnishees both being Illinois corporations. The testimony examined, discussed in the opinion, and *held*, that the trial court in the exercise of sound judicial discretion had jurisdiction to hear and to determine the action.
2. ———: ———. Section 7746, Rev. St. 1913, construed, and *held*, that a debt owing by the defendant, an Illinois corporation, and in pursuance of a contractual obligation payable in that state to an Illinois corporation, may, in a proper case, by attachment and garnishment commenced in this state, be subjected to the payment of a debt owing to a resident of Iowa.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Helsell & Helsell and *William Baird & Sons*, for appellant.

M. F. Harrington, contra.

DEAN, J.

This action was begun on October 3, 1914, in the district court for Holt county by plaintiff against defendant, the Illinois Central Railroad Company, by attachment and garnishment. Plaintiff and defendant are both nonresidents of Nebraska, the former being a citizen of Crawford county, Iowa. The defendant is an Illinois corporation with its home office and principal place of business at Chicago. The suit is for personal injuries sustained by plaintiff on alighting from one of defendant's coaches at Denison, Iowa, on July 19, 1914, in the course of a trip made by her and her husband and minor child on that date from Dow City to Denison, distant ten miles. Plaintiff sued to recover $15,100. The jury awarded her a ver-

dict of $7.500. The Chicago, Burlington & Quincy Railroad Company and the Chicago & Northwestern Railroad Company were made garnishees. Both of the garnishees answered, disclosing that they each were severally indebted to defendant in sums respectively in excess of the amount sued for, but they each contend the indebtedness grew out of interstate shipments, and that by the terms of their respective contracts with defendant the debts arising therefrom are severally payable only at Chicago. The court overruled the objections and ordered the garnishees to pay to plaintiff a sufficient amount of money to discharge such sum as plaintiff might recover in the action with attendant costs. The defendant appealed.

Plaintiff in her petition alleged, in substance, that her injuries were brought about because defendant's employees kept the steps of the coach in which she was transported, "with the metallic parts, nails and wood thereof in a negligent, unsafe and dangerous condition. And by reason of this said condition the plaintiff, while attempting to get off said car and while unaided by the defendant or its servants, tripped, fell and was thrown first backward and then downward to the platform owned and maintained by defendant at said Denison." She also charges that defendant's negligence in the premises is intensified from the fact that she had lost her left hand, which was well known to defendant's employees, and that upon alighting from the coach she was entitled to more than ordinary care for that reason.

The petition goes on to charge: "By reason of the carelessness and negligence of defendant and its servants in failing to assist her from said car, she fell and was thrown, and the heel of one of her shoes broken off, and she was first thrown backward and then thrown forward and down and upon a platform of said defendant at said Denison, whereby she sustained the following injuries to wit: Her left foot between the toes and ankle, and in the ankle, were strained and all parts thereof were crushed, bruised, torn and injured, and she was rendered lame in her left foot and leg.

Plaintiff's right hip was crushed, bruised, blackened, torn, and injured, and plaintiff's right side and her back were crushed, torn, lacerated, bruised, blackened, and injured, and her neck was bruised, injured, made lame, and sore. * * * That by reason of said injuries the plaintiff has ever since sustained and ever will sustain great nervousness, and her nervous system has been permanently injured. * * * That plaintiff sustained all of said injuries without fault or negligence on her part."

The defendant answered, generally, reserving and not waiving its special appearance, objecting to the jurisdiction of the court, and pleading: "That the plaintiff is a resident and citizen of Crawford county, Iowa. That the alleged injury complained of * * * is alleged to have occurred at * * * Denison in said Crawford county, Iowa. That the Illinois Central Railroad Company, * * * is a legal corporation * * * of Illinois, having its home office and principal place of business in * * * Chicago." The answer then alleges that the Chicago, Burlington & Quincy Railroad Company and the Chicago & Northwestern Railroad Company, both garnished in this action, are both of them Illinois corporations with their respective home offices and places of business in Chicago, and that the alleged indebtedness owing by both of the companies respectively to defendant consists of liabilities which accrued outside of Holt county and which are payable in Chicago; that defendant never had any railroad line in Holt county, nor agent, nor representative, nor any property in Holt county subject to attachment, and never at any time material to the issues had any debts owing to it in Holt county. "That the attempted attachment and garnishment * * * is an unjust and unlawful abuse of the process of this court. That by reason of the fact that the plaintiff and defendant are both nonresidents of * * * Nebraska and there is no cause or legal or just reason shown why this court should take or assume jurisdiction of this case, it is an unjust abuse of the process and powers of this court in assuming to take and retain jurisdiction of this case and in

requiring this defendant to answer herein, and this court is not required under the rules of comity to take or retain jurisdiction of this case. That assuming and retaining jurisdiction of this case, and compelling this defendant to answer herein, would, if the same should be retained and prosecuted to judgment, deprive this defendant of its property without due process of law and deny to it the equal protection of the law contrary to the provisions of the Constitution of the United States in such cases made and provided." As to the injuries complained of in the petition, defendant pleads a general denial, and prays that the action be dismissed with its costs. The reply is in the usual form denying every allegation of new matter in the answer.

Section 7746, Rev. St. 1913, as amended in 1911 (Laws 1911, ch. 168) is as follows: "PROPERTY AND GARNISHEE BOUND BY ORDER. An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, moneys, and credits in his hands, or due from him to defendant, from the time he is served with the written notice mentioned in section one hundred and eighty-two, notwithstanding the money or debt owing by such garnishee, and which is sought to be attached, may be payable at the place of residence of a nonresident defendant; but where the property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment."

The 1911 amendment of section 7746 incorporated this language in the body of the act: "Notwithstanding the money or debt owing by such garnishee, and which is sought to be attached, may be payable at the place of residence of a nonresident defendant."

Our attention has not been called to any construction of this statute made since the amendment. There are many citations not applicable to the present case, but to actions arising thereunder before the amendment.

Each of the garnishees has a line of railroad in Holt county, and an office and agent there, so that service can be made upon them in that county. The record shows that

they are indebted to the principal defendant, the Illinois Central Railroad Company. Under section 7746, Rev. St. 1913, such garnishees are "liable to the plaintiff in attachment" for credits in their hands, "notwithstanding the money or debt owing by such garnishee, and which is sought to be attached, may be payable at the place of residence of a nonresident defendant." This gave the court jurisdiction of the garnishees and of their indebtedness to the principal defendant. The defendant insists that the court could not obtain jurisdiction over it, because it had no line of road or other property in Holt county, and made special appearance to insist upon this objection. The defendant, however, appeared so far as to contest the attachment and garnishment, and the court had jurisdiction to apply the credits so garnished in satisfaction of the plaintiff's claim against the defendant. The judgment is not personal against the defendant and affects only the attached liability of the garnishees.

On the merits, both parties introduced considerable testimony, and much of it is in sharp conflict; but the jury as triers of disputed questions of fact having passed upon this feature of the case, we are not disposed to disturb the verdict, there being sufficient testimony to support it. Defendant did not file a motion for a new trial, but filed a "motion in arrest of judgment and to dismiss the action." It is fundamental that a motion in arrest of judgment and to dismiss cannot be made to take the place of a motion for a new trial. Nevertheless, we have considered every point raised by defendant in the motion in arrest of judgment that has been presented in the oral arguments of counsel and in the briefs.

That plaintiff sustained injuries and that there was an accident on the occasion complained of by plaintiff is shown by the testimony that relates to plaintiff's alighting from the train at Denison. She testifies that she was injured because of defects in the steps of the coach, and that in leaving the coach her left foot was caught in one of the steps in such a manner as to throw her down with such

violence as to impart to her the injuries complained of. The left shoe that plaintiff wore at the time of the accident was introduced in evidence and is attached to the record. The lower layer of the heel is detached, and the one immediately above shows that it too, while not detached, was subjected to some strain. The heel is high and so narrow at its lowest point that it would readily protrude through a small opening, such as plaintiff's husband testified he saw in one of the car steps. The plaintiff testified that, when the lower layer of the heel was torn off at the time of the accident, she saw it under the car step and within a foot of the rail, and that it was picked up by one of the trainmen. In this she is corroborated by witness McCarthy, flagman on the train, who was called by defendant, and he testified that he picked up the layer of the heel from the ground under the lower step. Referring to plaintiff, he also testified that he did not "know how she slipped, but she slid down the steps in a sitting position to the platform," and that he assisted her to rise.

The record is voluminous. Approximately 35 witnesses testified, and among them several physicians. It is impracticable to reproduce much of the testimony within the space that should be allotted to an opinion. We deem it sufficient to say that in the state in which we find the record we conclude there is sufficient testimony to sustain the verdict of the jury.

Defendant invokes the rule of comity as a defense, and argues that the case may properly be tried in Iowa, but that it is not triable in this jurisdiction. Counsel argue at length and with much earnestness that the trial court had no jurisdiction of the subject-matter because neither of the parties to the suit are citizens or residents of this state, and because defendant had "no property in Holt county and no debts owing to the defendant in Holt county, and the defendant could not be found in Holt county. * * * The jurisdictional proposition in this case involved the right of attachment and garnishment. And if the court reached nothing by the garnishee process, it is evident that,

as regards the *rem* which represented the subject-matter on that phase of the case, it acquired no jurisdiction."

Section 2, art. IV of the federal Constitution, viz.: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"—has been construed by the supreme court of the United States in the following cases, among many others: In *Paul v. Virginia,* 8 Wall. (U. S.) 168, Mr. Justice Field, in construing the privileges and immunities provision of the federal Constitution says: "It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

In *Mason v. The Blaireau,* 6 Cranch (U. S.) *240, *264, Marshall, C. J., in discussing the rights of aliens to bring an action in a court of the United States, says: "On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it."

Chambers v. Baltimore & O. R. Co., 207 U. S. 142, holds: "The right to sue and defend in the courts of the states is one of the privileges and immunities comprehended by section 2, art. IV of the Constitution of the United States, and equality of treatment in regard thereto does not depend upon comity between the states, but is granted and protected by that provision in the Constitution; subject, however, to the restrictions of that instrument that the limitations imposed by a state must operate in the same way on its own citizens and on those of other states. The state's own policy may determine the jurisdiction of its courts and the character of the controversies which shall be heard therein."

See *Corfield v. Coryell,* 4 Wash. C. C. 371; *Ward v. Maryland,* 12 *Wall.* (U. S.) 418; *Conner v. Elliott,* 18 How. (U. S.) 591; 11 Cyc. 663, 667; *Eingartner v. Illinois Steel Co.,* 94 Wis. 70; *State v. District Court of Waseca County,* 126

Minn. 501; *Davis v. Minneapolis, St. P. & S. S. M. R. Co.*, 134 Minn. 455.

It seems from an examination of the authorities bearing on the question last discussed herein that the rules pertaining thereto are not immutably fixed. The apparent conflict in the cases arises mainly from the application of local statutes that in terms affect the citizens of all states alike. From the facts appearing in the present case, it was not an abuse of sound judicial discretion for the court to hear and to determine the action, notwithstanding all of the parties and their witnesses were nonresidents of this state. Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

HAMER, J., concurring separately in part.

I would put in the opinion that it should be the duty of the trial court, before entertaining jurisdiction and preliminary to the trial, that there might be a showing touching the extreme hardship of meeting an action brought in another state than that in which the defendant has its residence. I would do this for the protection of the defendant company because of the fact that a common carrier of passengers and freight works for the public, and if it can be put to great expense in defending itself at a long distance from its residence the business might be impoverished. Witnesses must be gathered up where they can be found, and to take witnesses away 500 to 1,000 miles to testify in a case of this sort is to put a great burden upon the parties, and especially upon the defendant if it should be necessary to render judgment against it. I would not permit the exercise of jurisdiction, except that the court first inquire where the place of trial shall be convenient to the parties, and I would make it ground to reverse the judgment, if there was abuse of discretion upon the part of the trial court in determining the place of trial. By way of illustration, I would say that the little business I have had

as a lawyer could be utterly ruined if I might be sued 1,000 miles away from home, because some one there may be indebted to me.

STATE, EX REL. WILLIAM P. MARROW, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED MARCH 16, 1917. No. 19901.

1. **Statutes:** CONSTRUCTION. "In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will." *Hagenbuck v. Reed*, 3 Neb. 17.
2. ———: ———: TITLE. In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act.
3. ———: ———. It is the duty of the court to discover, if possible, the legislative intent from the language of the act. It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language. In the legislative domain, and within constitutional bounds which it is bound to follow, the legislature is supreme.
4. ———: ———: JUDICIAL NOTICE. In the construction of a statute, courts take judicial notice of events and conditions generally known within their jurisdiction.
5. **Municipal Corporations:** COMMISSION FORM OF GOVERNMENT: OFFICERS: ELECTION. Section 5300, Rev. St. 1913, construed, and *held* to apply to Lincoln, a city of approximately 60,000 inhabitants.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed, with directions.*

Fawcett & Mockett, L. C. Burr and *J. A. De Bardeleben*, for appellant.

C. Petrus Peterson, George W. Berge and *Charles R. Wilke, contra.*

DEAN, J.

In April, 1912, the city of Lincoln adopted and it is now governed by the commission form of government in pursuance of the provisions of the Banning law (Laws 1911, ch. 24) being sections 5288-5311, Rev. St. 1913. This is an application for a writ of mandamus brought in the district court for Lancaster county by William P. Marrow, relator and appellant, against the city of Lincoln, defendant and appellee, to compel the city to reinstate him in the fire department of the city as assistant fire chief, from which position he was peremptorily discharged by the mayor and city council. The writ was denied, and relator has brought the case here for review.

Relator's employment in the city's fire department commenced on July 2, 1911, at a monthly salary of $75, and at subsequent periods he was promoted to the positions of lieutenant and captain and assistant fire chief, in the latter position his monthly salary being $100. It was while in this position that he was discharged by order of the commission, a body consisting of five members, in pursuance of a resolution passed on December 31, 1915, by four members of the city council. The order of discharge briefly recites that the services of relator, as a "member of the fire department, be and the same are hereby dispensed with." The resolution by its terms became effective immediately on its passage. No charges were filed by the council nor by any person against relator, and it follows that he had no hearing before the council. The testimony introduced by relator in the district court disclosed that he was a capable and efficient officer in the several capacities in which he had served in the city's fire department. The city did not offer any testimony.

Relator argues that in view of the premises the city council was without lawful authority to dismiss him. Defendant contends that it was justified in discharging relator peremptorily and that in the premises its acts are within the law. To determine the controversy between the parties it becomes necessary to construe so much of the Banning

law and the firemen's pension act as apply to the facts in the case before us. The title to the Banning act and section 13 thereof follow:

" An act for the government of all cities having, according to the last preceding state or national census, five thousand or more population, and to enable such cities to adopt the provisions of this act called the 'commission plan of city government.' "

Section 13 (Rev. St. 1913, sec. 5300): "The council shall at its first meeting, or just as soon as possible thereafter, elect as many of the city officers provided for by the then existing laws or ordinances governing any such city as may, in the judgment of the council, be essential and necessary to the economical but efficient and proper conducting of the government of the city, and shall at the same time fix the salaries of the officers so elected either by providing that such salaries shall remain the same as fixed by the then existing laws or ordinances for such officers or may then raise or lower the existing salaries of any such officers, and the council may modify the powers or duties of any such officers, as provided by then existing laws or ordinances, or may completely define and fix such powers or duties anew. Any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time: Provided, however, in cities of the metropolitan class no member or officer of the police department, or department of police, sanitation and public safety or of the fire department or department of fire protection and water supply, shall be discharged for political reasons, nor shall a person be employed or taken into either of such departments for political reasons. Before any such officer or employee can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given such officer or employee to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of such member by the council in case of misconduct or neglect of duty or disobedience of orders. Whenever any such

suspension is made, charges shall be at once filed by the council with the officer having charge of the records of the council and a trial had thereon at a second meeting of the council after such charges are filed. For the purpose of hearing such charges the council shall have power to enforce attendance of witnesses, the production of books and papers, and to administer oaths to witnesses in the same manner and with like effect and under the same penalty, as in the case of magistrates exercising civil and criminal jurisdiction under the statutes of the state of Nebraska."

The modern writers and authorities generally hold that, in case of doubt as to the meaning of a statute, resort may be had to the title of the act as an aid to discover the legislative intent, but of course by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act. And this is particularly the case in a state where the Constitution requires the subject of the act to be expressed in the title. Black, Interpretation of Laws (2d ed.) sec. 83; 2 Sutherland (Lewis') Statutory Construction (2d ed.) sec. 339. In the present case it will be noted that the title refers to "all cities having * * * five thousand or more population."

Defendant contends both in the oral argument and in its brief that cities of the class of Lincoln have an unrestricted right to remove at any time any employee without the formality of preferring or filing charges and without such employee being given an opportunity to be heard in his defense. In its brief it prints in full section 5300 above referred to, and in italics these words, "Any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time," and argues that "the power of removal is by that section (5300) given to the city of Lincoln unrestricted, to be exercised in their discretion and at their pleasure, and any officer or employee so appointed holds his office in their discretion and at their pleasure."

To consistently maintain its argument the city must also contend that the words "such officer or employee" in

that part of the section following the word "provided" relate only to the officers named in the proviso. If "in cities of the metropolitan class no member or officer of the * * * fire department * * * shall be discharged for political reasons," why the necessity of having such "member or officer" of a city of the metropolitan class safeguarded against a discharge "for political reasons" when he cannot at all be discharged for those reasons? We hold that the proviso clause of the section under consideration begins with the words, "Provided, however," and ends with the words, "departments for political reasons." So read, the proviso is complete in itself, and construed in the light of the other parts of the act and other statutes it was so intended by the legislature. Any other construction of that statute is too refined for practical use. We cannot give our assent to the defendant's argument, nor to the judgment pronounced by the learned trial court.

Mr. Justice Story in *Minis v. United States,* 15 Pet. (U. S.) *423, speaking for the supreme court of the United States, says: "The office of the proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended by the legislature to be brought within its purview."

A rule of statutory construction is admirably stated in the early case of *Hagenbuck v. Reed,* 3 Neb. 17, cited in syllabus 1 herein: "In the construction of a statute, * * * no sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will."

Applying the foregoing rule to the present case, we find the proviso is so plain that it is not susceptible of strained construction. It provides on the point involved that "no member or officer of" the several departments of a metropolitan city that are embraced within its terms "shall be

discharged for political reasons." The proviso does not use the word "employee." That word is first used in section 5300, immediately preceding the proviso in this connection: "Any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time." The next use of the word "employee" is found in the language immediately following the proviso, where it is used twice: "Before any such officer or employee can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given such officer or employee to defend against such charges." Clearly the designation "officer" and "employee," as used in the language following the proviso, relates back to the subject embraced in the language that precedes the proviso. In view of the universal rule that the proviso is to be strictly construed, it would certainly be a strained construction to hold that all of section 5300 that follows the word "provided" is a part of the proviso, as the city seems to contend. To hold that all the remainder of the chapter is a part of the proviso would be a construction only a little less liberal.

That it is the duty of the court to discover, if possible, the legislative intent from the language of the act is elementary. It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language. In the legislative domain, and within constitutional bounds which it is bound to follow, the legislature is supreme.

In the construction of a statute, courts take judicial notice of events generally known within their jurisdiction. In the present case the court may properly take judicial notice of the comparative size of the cities within its jurisdiction, and the reasons urged for and against the enactment of laws relating to cities generally. With this in mind, we can discover no reason why the legislature should have intended to grant to a member of a fire department in a city of 100,000 inhabitants and upwards, a right to be faced by his accusers and to be heard in his own defense,

and in the same act deny the right to a member of the fire department in a city of approximately 60,000 inhabitants. In the construction of the statute before us, the court will not impute to the legislature an intent to be unreasonable, nor to commit itself to anything that is so manifestly un-American. It is always presumed the legislature intends to do the reasonable thing.

In the interpretation of a legislative enactment, it is the duty of the court to apply to the act generally accepted rules of statutory construction, to the end that effect may be given to the will of the legislature. The law-making body too is bound by such rules. But, in any event, if a law is objectionable application should be made to the legislature for its repeal or modification. The right to be heard, the right of any citizen in any walk of life to have his day in court, should not be denied him by placing a strained and technical construction upon a statute, and if there is any doubt about the meaning of the legislative language in this respect it should be resolved in favor of a hearing, rather than against a hearing. Such interpretation is more in harmony with the genius of our institutions.

In addition to the foregoing defense, the relator argues at some length that, by virtue of his employment in the fire department, he thereby had a vested right in the fireman's pension fund in pursuance of sections 2516-2519, Rev. St. 1913, which, in brief, provide that, after a service of 21 years, such employees shall be entitled to the pension named in the act. It is conceivable that an arbitrary discharge of a fireman might be brought about without a hearing, for the sole purpose of enabling the city by indirect means to evade the payment of a pension. But, in view of our holding that the relator is entitled to a hearing in pursuance of section 5300, it does not appear to be necessary to discuss the pension feature at greater length.

Both of the parties too gave considerable attention in their respective briefs to questions of procedure. But on the final hearing technical rules relating to practice were for the most part abandoned, for which both parties are to

be commended, thus avoiding the necessity on the part of the court of discussing anything save the merits.

The judgment of the district court is reversed, and the cause remanded, with instructions to enter a judgment in accordance with the views expressed in this opinion.

REVERSED.

CORNISH, J., not sitting.

SEDGWICK, J., concurring.

When this case was being heard before the district court, the judge suggested to the attorney for the city that he supposed "that you would introduce testimony as to the reason or motive for the discharge of plaintiff by the city," and the city attorney answered: "We do not intend to introduce any testimony. It is our desire to have a square decision of the law in this case of the right and power of the city to discharge the plaintiff without notice or opportunity to be heard, and without hearing or charges being filed." Whereupon counsel for the relator said: "With that statement the plaintiff rests." No formal return was made to the alternative writ, but the city filed an answer to the application for the writ, which I think the court may properly consider in the nature of a general demurrer and determine the precise and only question so presented.

The question is whether section 13 of the so-called Banning act confers upon the city council of Lincoln the power to discharge a member of the fire department arbitrarily without stating any cause therefor, and without a hearing. Of course section 13 is to be construed in the light of the other sections of the act and in the light of other provisions of the statute which are still in force. The precise question is whether the whole of section 13 after the word "provided" is to be construed to apply only to cities of the metropolitan class, or whether that part of the proviso which provides that charges must be filed against such officer before he can be discharged, and regulates the procedure thereon, applies to all cities that may become governed by the act. The legislation from which this question is to be

determined is not as specific and clear as might be desired. The clause that "no member or officer of the police or fire department shall be discharged for political reasons, nor shall a person be employed or taken into either of such departments for political reasons," is taken from the act of 1905 (Rev. St. 1913, sec. 4200) which applies only to cities of the metropolitan class, and in that act those words were followed with the provision that, "before a policeman or fireman can be discharged, charges must be filed against him," etc. In section 13, which we are considering, the expression is "before *any such officer or employee can be discharged.*" The fact that the provision for filing charges and having a hearing before removal is borrowed from the statute covering metropolitan cities, and is not found in any of the statutes covering cities of other classes, indicates that the legislative intent was that this provision should apply only to cities of the metropolitan class as contended by the city. In cities of the first class, having over 40,000 and less than 100,000 inhabitants, there is a provision that "any such officers so appointed may be removed at any time by a vote of three-fourths of all the members of the council." Rev. St. 1913, sec. 4483. And in cities from 25,000 to 40,000 inhabitants it is provided that the mayor "shall have power in like manner to remove from office, by and with the consent of a like majority of the council, any person or persons by him appointed thereto." Section 4654. These facts furnish some indication that in these two classes of cities it was not intended by section 13 of the Banning act to require that charges should be filed and a hearing had before appointed officers were removed. If, however, we examine the provisions of the statutes governing the cities of the respective classes, we find also indications that the legislature intended that this provision in regard to formal charges and hearing should also apply to other cities than of the metropolitan class. In cities of over 5,000 and less than 25,000 inhabitants it is provided that police officers "may be removed by the mayor at pleasure;" that other appointive officers may be removed *for cause.* Section 4874. This

would of course require a statement of the cause and a hearing thereon. We see therefore that the internal evidence of the act itself, in the light of existing statutes upon the same general subject now in force, is conflicting and somewhat uncertain. To determine the intention of the legislature it is therefore very important to consider the nature of the office from which the relator was discharged, and the fact that by his discharge he is deprived of the benefit of the firemen's pension law. If the city can discharge him without cause and without stating or having any reason therefor, it can be done of course at one time as well as another; and, when he has served for nearly the length of time to entitle him to a pension upon withdrawing from the service, he may be arbitrarily discharged and be deprived of his expected pension. It is argued that a fireman has no vested right in a pension under the statute, but whether or not he has a vested right, that is, a contract right, of which he cannot be deprived without compensation, it must be conceded that a competent and efficient fireman who has conscientiously and strictly performed his duties for a term of years has an interest in his prospective pension by which he may support his family and himself in his declining years. "The pension forms an inducement to the individual to enter and remain in the service of the fire department, and the pension in a sense is part of the compensation paid for those services. * * * The state is under the same moral obligation to its injured firemen that it owes to the citizen who is injured while assisting in the capture of a criminal. The legislature may transform that duty into a legal obligation, and impose it upon the municipalities by statutes general in their application to the class of cities affected thereby, and, so long as the law is not repealed, that obligation will be enforced by the courts." *State v. Love,* 89 Neb. 149, 156. We cannot consider that the legislature would authorize the city authorities to deprive him of this right without cause, and without reason, and without a hearing, unless it has so declared plainly and in unequivocal language. A similar question was presented to the supreme court of Michigan

(*Pulford v. Fire Department,* 31 Mich. 458), and it was there decided: "There can be no power to impose forfeitures unless granted by clear legislative enactment. * * * It is abhorent to all reason to allow a forfeiture to be enforced on an alleged default without notice and a hearing, or an opportunity to be heard." And in the opinion it is said: "Summary means and methods unknown to the common law must be authorized by express authority." In *State v. Love,* 89 Neb. 149, the opinion says that in *Gillespie v. City of Lincoln,* 35 Neb. 34, it is said that firemen are all "public or state officers vested with such powers as the statute confers, and that the duties they perform do not relate to the corporate functions of the municipality." If we conclude that the law is that appointed officers may ordinarily be removed by the appointing power, still when such removal destroys a very valuable right of the officer removed, expressly given him by statute, if we should say that the legislature might authorize such removal, it will not be considered that the legislature has done so, unless it is by the most clear and explicit terms.

It may be true, as contended by the city, that if we look only to the language of the Banning act, under which the city was being administered, the city might have authority to act upon its arbitrary will in employing or discharging its employees. But this other provision of the statute applying to the city of Lincoln gives to firemen who have served the city for 21 years a right to a pension. In considering the rights of the relator, it seems that these two acts must be construed together. If the pension law is to be effectual for the purposes intended, it must be that an employee cannot be discharged on purpose to save the city from paying the pension provided for. Nor could the city adopt any method of employing or discharging such employees which would tend to defeat the purposes of the pension law. On the other hand, in legal contemplation, the employee has no vested or contractual right in the anticipated pension until its contingency has arisen. This, however, is an indisputable fact that employees will enter the service and remain in

it with such a promise held out to them, when otherwise they would not. This mere expectancy of theirs is intended by the pension law itself for better and longer-continued service. In regarding the pension law, we must regard that. The question we have to consider is what should be the rule as to discharging employees so as not to do violence to either of the laws above mentioned. If the city council can discharge such employees without giving a reason therefor, then it might do so arbitrarily and with the intention of defeating his pension, leaving him somewhat helpless as to the proof of the real nature of his discharge, and thereby creating a situation which would render the pension law inoperative for the purposes for which it was intended.

On the trial of this case, the respondent declined to offer any testimony or give any reasons for the discharge of the employee. The trial court placed the burden of proof upon the employee to show that he was discharged for the purpose of defeating him of a pension, or under a system of discharging employees which would render inoperative the purposes of the pension law. In this I think the trial court erred. I think the better rule would be, if the spirit and intention of the Banning act and the pension law are both to be carried out as near as may be, that, before such an employee can be discharged, the substantial reason therefor should be stated, and that, if the reason given therefor is untrue, or if the reason given is one which, if acted upon, would go contrary to the purposes of the pension law, as designed, then such a discharge should not be permitted. Mere arbitrary or capricious discharge would operate to defeat the pension law. The burden of showing the reason for the discharge should be upon the city council. By this I do not mean that the city is powerless to discharge such employee for any reason that appears good to it, acting as reasonable men. It has full power to do whatever, in the exercise of its discretion, is reasonably necessary for the betterment of the service. The trial court heard evidence of relator apparently upon the theory that it was proper and necessary that the relator should show that his discharge

was for the purpose of depriving him of his pension right. Of course upon the same theory the relator would sustain his case by proving that he was discharged for any unlawful or insufficient reason. This theory virtually concedes the relator's claim that he could only be discharged for cause. The most natural and regular way to prove that he was not discharged for any insufficient or improper cause would be to show that he was discharged for sufficient cause. And this burden should be placed upon the authorities who discharged him.

While the general question in this case is not free from serious doubt, I am inclined to agree with the opinion that the judgment of the district court should be reversed.

ROSE, J., dissenting.

The relator, assistant chief of the fire department of Lincoln, was discharged by the city council without notice or hearing. Later, in the district court for Lancaster county, he applied for a peremptory writ of mandamus to compel respondents, members of the city council, to reinstate him. The writ was denied, and he has appealed. In reviewing the proceedings of the trial court a majority of my associates hold that respondents had no authority to remove relator summarily. I dissent. In my opinion the power of the council to remove relator in the manner indicated is clearly conferred by the Lincoln charter, which provides that any "officers or any assistant or employee elected or appointed by the council may be removed by the council at any time." Rev. St. 1913, sec. 5300. Lincoln is under the commission form of government, and the members of the city council justify the dismissal of relator under that part of the charter declaring: "Any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time." Rev. St. 1913, sec. 5300.

In my judgment the opinion of the majority nullifies this plain expression of the legislative will by giving an unwarranted import to the language following the provision on

the subject of removals in Lincoln and other cities under the commission form of government. That language is:

"*Provided, however,* in cities of the metropolitan class no *member or officer* of the police department, or department of police, sanitation and public safety or of the fire department or department of fire protection and water supply, shall be discharged for political reasons, nor shall a person be employed or taken into either of such departments for political reasons. Before any *such officer or employee* can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given *such officer or employee* to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of *such member* by the council in case of misconduct or neglect of duty or disobedience of orders. Whenever any such suspension is made, charges shall be at once filed by the council with the officer having charge of the records of the council and a trial had thereon at a second meeting of the council after such charges are filed. For the purpose of hearing such charges the council shall have power to enforce attendance of witnesses, the production of books and papers, and to administer oaths to witnesses in the same manner and with like effect and under the same penalty, as in the case of magistrates exercising civil and criminal jurisdiction under the statutes of the state of Nebraska." Rev. St. 1913, sec. 5300.

This is all proviso. It applies alone to Omaha, a city of the metropolitan class. The majority have fallen into grave errors by assuming that the proviso ends with its introductory sentence and by interpolating what follows into the preceding sentence authorizing the city council to remove officers and employees "at any time." Lincoln is not a city of the metropolitan class, and the sentence commencing with the word "provided" has no application to respondents. The second sentence in the proviso reads:

"Before any such officer or employee can be discharged charges must be filed against him before the council and a hearing had thereon, and an opportunity given such officer

or employee to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of such member by the council in case of misconduct or neglect of duty or disobedience of orders."

In the majority opinion it is held that the words "any such officer or employee" refer to "officers or any assistant or employee" in the sentence preceding the word "provided," and not to "member or officer" in the provision relating to the fire and police departments of Omaha. The reason given by the majority for this construction is that, in the sentence commencing with "provided," the word "employee" was not used, and that therefore the words "any such officer or employee" refer to the sentence preceding the proviso. The second sentence in the proviso shows, however, that "employee" was used in the same sense as "member." After providing that an opportunity must be "given such officer or employee to defend," the statute declares that "this provision shall not be construed to prevent peremptory suspension of such member by the council in case of misconduct or neglect of duty or disobedience of orders." The provision that, "before any *such* officer or employee can be discharged," charges must be filed refers to a "member or officer" of the fire or police department of Omaha. "Such" is "descriptive, and is a relative word," and "must be referred to the last antecedent, unless the meaning of the sentence would thereby be impaired." *Summerman v. Knowles,* 33 N. J. Law, 202, 205. See, also, *Tuggle v. Enterprise Lumber Co.,* 123 Ga. 480; *Commonwealth v. Burrell,* 7 Barr. (Pa.) 34, 37; *Benoit v. New York C. & H. R. R. Co.,* 87 N. Y. Supp. 951.

In Lincoln and Omaha the difference in the power to remove firemen and policemen was not created by the act under consideration, but existed for a number of years under previous charters. The city council of Lincoln was authorized to remove such officers without notice or hearing. Rev. St. 1913, secs. 4483, 4489. In Omaha, however, their removal for political reasons was prohibited. No member of the fire or police department of Omaha could be dis-

charged without a hearing. Rev. St. 1913, sec. 4200. The intention to retain this feature in the charter of Omaha under the commission form of government is obvious from a reading of the act. Rev. St. 1913, sec. 5300.

The history of the act is of the same import. Section 5300 of the Revised Statutes is section 13 of the original act. Laws 1911, ch. 24. When the bill was introduced, section 13 ended with the provision that "any such officers or any assistant or employee elected or appointed by the council may be removed by the council at any time." Upon report of the committee of the whole, section 13 was amended by inserting after the word "time" all that part of the section as it now stands, commencing with "provided." Senate Journal, 1911, p. 644. The addition to the original section of the bill contains the substance, and in many respects the wording, of that part of the Omaha charter prohibiting the removal of firemen and policemen without a hearing. Rev. St. 1913, secs. 4200, 5300. It is clear that the legislature did not intend to restrict the power of the council of other cities to remove "at any time" officers, assistants and employees elected or appointed by it.

According to the majority opinion, as I understand it, the right to a hearing is not limited to firemen and policemen in Omaha as stated in the plain language of the lawmakers, but extends to every officer, assistant and employee selected by the council of a city under the commission form of government. The effect of the decision is to take from the council of Lincoln, after summary removal has been authorized in direct statutory terms, the power to remove such officers and employees without a hearing. As I view the opinion, it includes an exercise of power committed by the people to the legislature alone.

LETTON, J., joins in this dissent.

TIMOTHY MURPHY, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 31, 1917. No. 19083.

1. Waters: OBSTRUCTION OF STREAM: LIABILITY. Overflow waters of a stream which have spread over the adjoining country, whence they disappear only by evaporation or percolation, may be defended against as surface waters, but overflow waters which flow in an accustomed course through a depression into the same stream at a lower point in its course or into another stream or lake, though they do not flow in a channel with well-defined banks, do not become surface waters, and if their accustomed course is negligently obstructed by a railroad embankment, the railroad company is liable for damages to crops caused by the waters so retained.

2. ———: ———: DAMAGES. If, however, some damage would have occurred, even if the railroad embankment had not been built, the company would only be liable for such damages in addition thereto as were caused by the damming or obstruction of the waters to a greater height or for a longer time than would otherwise have occurred.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed.*

Byron Clark, Jesse L. Root and *J. W. Weingarten,* for appellant.

R. E. Evans, contra.

LETTON, J.

This is an action to recover damages for the destruction of and injury to hay, grain and growing crops by flooding, alleged to have been caused by the negligent construction of defendant's bridges and roadbed.

The petition, in substance, alleges that in the locality where the damage was done Omaha creek ran northerly, then easterly, then southeasterly into the Missouri river; that the creek is subject to heavy floods; that its banks close to the channel on the west are higher than at a distance from the same; that the railroad crosses Omaha

creek twice in the village of Homer, and that in the bridging of the creek the defendant negligently constructed the bridges by using piles so as to obstruct the flow of the water in the channel and catch and hold debris; that the water which would otherwise flow through the channels overflow on the west side of the railway, and flows down over and across land which is farmed by the plaintiff and his assignors, that the waters of Elk Creek, a stream flowing from the north, flow into Omaha creek about a mile and a half north of the bridges; that at the junction of these creeks in times of high water the banks of the stream are frequently overflowed. It is also alleged that there is a well-defined slough or channel or way through which the flood waters formerly rapidly flowed off to the east and southeast; that defendant negligently constructed a railroad embankment about four feet high across said flood-water channel and failed to provide sufficient means by which the flood waters could seek their natural outlet toward the Missouri river, into which the waters of Omaha creek naturally flow; that on August 16, 1912, there was a flood in said creeks, by reason of which and of said bridges so negligently constructed flood waters were thrown out of the channel and held upon the land of plaintiff by the railroad embankment to the damage of his crops, specifying the items. There are six other causes of action alleged for damage to crops upon other tracts of land either owned by the plaintiff or owned by others who have assigned their right of action to him.

The answer admits the construction of the railway, and that there was high water at the time stated, denies the facts alleged as to the crops, pleads that the overflow was the result of natural causes and of obstructions created by the construction of public highway bridges across Omaha creek. The case was tried without the intervention of a jury. The court found that the defendant was negligent in the construction of the embankment and bridges thereby causing the flood waters to flow across the lands described in the petition, retarding the flow therefrom, and destroy-

ing crops to plaintiff's damage in the sum of $3,026.80, for which sum judgment was rendered.

The flooded land lies upon what is known as the Missouri river bottoms. At this point Omaha creek, which drains a large territory, flows northward at a distance of about half a mile east from the line of the bluffs which form the western edge of the river valley. A short distance to the west of the stream there is a low ridge, so that a depression is formed between the bluffs and this ridge extending from near the railroad bridges about as far as the junction of Omaha and Elk creeks. The village of Homer lies near the south end of this depression. The line of railway crosses a loop or bend of Omaha creek in or a little south of the village of Homer by two bridges, both of which cross the creek somewhat diagonally. There is some evidence tending to prove that the northern of these two bridges obstructed the water of the stream, but, since the water passing through this bridge flowed from the east side of the embankment to the west side, this could not cause the flood on the west side of the railroad or cause the flood waters on the west side to flow northward through the depression mentioned to the land in section 2, described in the fifth cause of action.

The evidence is not disputed that before the railway was built the flood waters of Omaha creek, augmented by those of the tributary south of Homer known as Fiddler creek, in times of flood followed this depression. Plaintiff contends that the bridges by the obstruction they created on account of piling in the channel and insufficient openings caused the flood within this channel and over the other lands. We are convinced, however, from an examination of all the evidence that the waters were so high that, even if the bridge and railroad had not existed, they would still have followed the course through the streets of Homer and down the depression west of the stream, and we find the evidence insufficient to sustain the fifth cause of action.

The important question in the case seems to be whether defendant is liable for damages to crops on other lands un-

der the second ground of negligence alleged, to wit: the negligent construction of the railroad embankment across a natural depression to the east of Omaha creek, through which it is alleged overflow waters from both Omaha and Elk creeks had been accustomed to flow. At the time of the flood the water was three feet deep on the west side of the track and the land was dry on the east side. Testimony in behalf of plaintiff showed that before the construction of the railroad Omaha creek and Elk creek had overflowed at least four or five times in twenty-five years. Flood water coming from the stream some distance south of the junction flowed southeasterly for several miles to the old Blyburg lake bed; another overflow, farther north, ran northeasterly and again entered Omaha creek near the railroad bridge in section one. The water which ran to the lake did not flow in a channel with well defined banks, but followed a wide and shallow depression in the nearly level land. It varied in width from a few rods where it left the stream to a half mile, farther southeast, and in depth from a few inches at the edges to three feet. The evidence does not show how wide the depression is where the railroad obstructs it or how high the water was before it would flow into the lake, but it is shown that the water would run off the land of Mr. Ashford and others of plaintiff's assignors within about 24 hours, doing practically no damage to growing corn. In the flood of August, 1912, the railroad embankment prevented the water from passing off to the southeast, and it was held on the lands for three, four and five days, in some places three feet deep. It did not pass off until the water in the creek subsided, when a considerable part drained into the creek through a borrow pit near the lower railroad bridge in section one.

Defendant contends that this water is surface water that it has a right to defend itself against, and that it is not liable for damages under the doctrine of *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb. 406. It insists that, if it be held otherwise, in order to escape liability it will be compelled to build a trestle a half mile long to permit the free

flowage of water in times of such rather unusual floods, since it cannot construct openings in its embankment to permit these waters to pass through without becoming liable to owners of lower lands for collecting surface water and discharging it in a body upon their land.

Plaintiff's contention is that the waters are not surface water, but are flood waters of a stream. There is a conflict in the authorities upon this question, but as to flood waters which follow a well-defined course and return to the same stream at a lower point in its course the question has been settled for this state in the cases of *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237, and *Brinegar v. Copass,* 77 Neb. 241. In the latter case it was said: "It is true that flood waters may become entirely separated from the stream and so have lost their identity with it. When it has spread over the adjoining country, settled in low places, and become stagnant, it can no longer be treated as a part of the stream, and the rules with respect to watercourses can then no longer be applied. But overflow waters from a natural stream in times of flood or freshet, flowing over or standing upon adjacent lowlands, do not cease to be part of the stream unless or until separated therefrom so as to prevent their return to its channel. 3 Farnham, Waters and Water Rights, sec. 879."

The evidence shows that the greater volume of the overflow waters would not return to Omaha creek at a lower point even had there been no embankment to obstruct their flow. These waters spread to some extent over the land east and southeast of their emergence from the creek, but did not remain there until lost by percolation or evaporation except in some small depressions. The testimony is not disputed that they found their outlet in the lake or lake bed about two miles to the southeast.

The question whether waters overflowing from a stream and following a slight natural depression, in a definite direction, and well-defined course, to an outlet in another stream or in a lake or lake bed, lose their character as flood waters and become, in contemplation of law, surface wa-

ters, which each landowner may dike against, is a new question in this state. In the *Morrissey* case the waters had never become part of a flowing stream. In the *Brinegar* case the waters were part of the stream, and after separation again returned to it. The basic principle which should determine the character of these waters seems to the writer to be the ancient maxim, *"Aqua currit et debet currere ut currere solebat."* Water runs and ought to run as it has used to run. Each owner of lands bordering upon either the normal or flood channels of a running stream is entitled to have its water, whether within its banks or in its flood channels, run as it has used to run, and no one has the right to interfere with its accustomed flow to the damage of another. The question has been considered in England. In *Rex v. Trafford,* 1 Barn. & Ad. (Eng.) *874, Lord Tenterden said: "Now, it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction." See, also, dictum of the Lord Chancellor in *Menzies v. Breadalbane,* 3 Bligh (Eng.) n. s. 414, 418; *Lawrence v. Great N. R. Co.,* 16 Ad. & E. (Eng.) 643, 654.

In a Wisconsin case the facts were that the flood waters of the Wisconsin river flowed in an accustomed course into the Baraboo river, and that the defendant city caused a street or causeway to be built so as to obstruct this natural waterway. The court said: "In the case before us it is obvious that the waters which were obstructed were not surface waters. They were the waters of the Wisconsin river, which, in its usual high stages, were accustomed to flow across this bottom into the Baraboo river. The effect of the road obviously would be to dam these waters, and

proper and sufficient culverts should have been provided for passing the waters through the embankment. But, because the road was negligently and unskilfully built, no such provision was made for the flow of the waters in their natural course. It seems to us the city was liable for damages accruing from the negligent and improper manner of constructing the highway." *Spelman v. City of Portage,* 41 Wis. 144.

In *Jefferson v. Hicks,* 23 Okla. 684, 24 L. R. A. n. s. 214, it was said: "The flood waters in the case at bar were accustomed, before the erection of the levee, to break out of the channel over the east bank of the stream at the place where the levee is being maintained and to flow down through the town site of Jefferson, and ultimately back into the main channel, or into another watercourse south of the levee. When the surface waters which fall upon the watershed of Pond creek ultimately gather and collect in the channel of that stream, they lose their character as surface water, and become the waters of a watercourse, and when they overflow the bank opposite the town site, and pursue a general course back into the same watercourse, or into another watercourse, although they do not follow a channel with well-defined banks, they continue flood waters of the watercourse, and do not become surface water." See, also, *Lampley v. Atlantic C. L. R. Co.,* 63 S. Car. 462; *Miller v. Eastern Railway & Lumber Co.,* 84 Wash. 31.

In *Conn v. Chicago, B. & Q. R. Co.,* 88 Neb. 732, it is said: "In the absence of a grant binding all persons affected and to be affected thereby, this court does not recognize the right of a railway company to obstruct the channel of a natural watercourse or drain, but has said that a continuing duty is imposed upon the carrier to permit the water to flow therein as it did in a state of nature, or to provide another adequate way therefor."

Mr. Gould says: "A stream does not cease to be a watercourse and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks be-

fore flowing again in a definite channel." Gould, Waters (3d ed.) sec. 264.

In 3 Farnham, Waters and Water Rights, sec. 880, it is said: "Every stream flowing through a country subject to a changeable climate must have periods of high and low water. And it must have, not only its ordinary channel which carries the water in ordinary times, but it must have, also, its flood channel to accommodate the water when additional quantities find their way into the stream. The flood channel of the stream is as much a natural part of it as is the ordinary channel. It is provided by nature, and it is necessary to the safe discharge of the volume of water. With this flood channel no one is permitted to interfere to the injury of other riparian owners. When the water rises until it reaches the margin of this flood channel, and begins to flow over it, it may do so in natural vents or outlets which are a part of the stream, and with which there can be no individual interference to the injury of other persons, or it may spread out uniformly over a large section of country in small volume and with no definite course or ultimate destination, but which will gradually be lost by evaporation or percolation into the ground. The principles which prevent interference with the water when a part of the rushing torrent, or when finding its way by well-defined outlets from one stream to another, do not apply with equal force to the water when it is spread out over the face of the country in such a way as to have lost its power to maintain a continued flow. By keeping these forms distinct, and considering in every case to which of them a particular decision applies, most of the seeming conflict in the authorities disappears."

We conclude, therefore, that all damage caused to crops by the holding back of water which but for the embankment would have flowed in an accustomed course to the lake bed is a proper subject of recovery.

As to the fourth and sixth causes of action there is proof tending to show that the waters of Elk creek did not join the flood of Omaha creek until Sunday evening. In the

meantime the backwater caused by the railroad embankment had been flowing to the north of Omaha creek at and below the junction. Plaintiff contends that the damages claimed under the fourth and sixth causes of action were due to the bridge in Homer, and to the construction of the railroad embankment across the channel of the flood waters of Omaha creek. So far as the evidence shows, the same amount of water would flow north to the junction of the two creeks and flow off to the southeast, if there were no obstruction at Homer, and, if no embankment lay to the eastward, it would not cross over Elk creek into section 35 and the north part of section 2 in quantities sufficient to harm crops. If the water flowed north of Elk creek in sections 2 and 35, in any volume, it was due to the embankment, and not to any obstruction by the bridges at Homer.

The first group of assignments of error is concerned with the manner of proving the value of the crops damaged or destroyed. In several instances the witness, after having stated the value of the crop as it stood before the flood, was asked what in his opinion was the difference in the value of the crop just before the flood and after it had been injured. The latter question was objected to as being improper and invading the province of the court. The objection was overruled, and this and other like rulings are complained of. Having fixed the value before the flood, and the witness having given the difference in value after the flood, the court had exactly the same facts before it as it would have had had the usual formula in jury trials been observed of asking what was the value before and what was the value after the flood and leaving the court to compute the difference. We cannot see that the defendant has been prejudiced by these rulings. Other testimony as to the value was received. Taken together, the evidence is sufficient on this point. However, we deem it advisable to call attention to the rules for proving the amount of damages to crops laid down in the cases of *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657, and *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745, and cases cited in these opinions.

Complaint is also made that, since plaintiff had conveyed his land to his daughters prior to the flood, he had lost all title to the crops, and could not maintain such an action unless his right to crops was reserved in the deed. But both plaintiff and his grantees testified that the crops were his for that year. A judgment in plaintiff's favor based on such testimony would effectually estop his daughters from afterwards claiming as against defendant that they owned the crop, and no prejudice can result on this account.

The peculiar conditions of the locality with reference to the course of drainage, the combination in one suit of seven causes of action for damages occurring upon different tracts of land, the manner in which the testimony was given, the numerous maps and plats in evidence showing ground and high water levels, and the lack of findings of damages in each cause of action have made this a most difficult and perplexing case to determine. After repeated reading and consideration of the record, we have reached the conclusion that the injury to the crop upon part of the land was occasioned by the retention of water several days longer than would have occurred had the embankment not been built, but the evidence is unsatisfactory as to what its condition actually is, how many of the tracts were affected by this condition, and as to the specific damages to crops occurring upon each tract, and is insufficient to support the general finding. It is also unsatisfactory as to whether the "Blyburg lake bed" is a mere shallow and ordinarily dry depression in the surface of the land with no outlet, or what its condition actually is. Upon another trial plaintiff may be able to supply sufficient proof, more especially as to the land near the swamp north of the junction and embraced in the first, fourth and sixth causes of action. There seems to be no definite proof of the cause of damages occurring to crops upon the Murphy land in section 36, described in the second cause of action.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., concurring.

I think that the judgment of the trial court ought to be reversed, but I do not concur in the principal statements and definitions in the opinion.

The first paragraph of the syllabus says: "Overflow waters of a stream which have spread over the adjoining country, whence they disappear only by evaporation or percolation, may be defended against as surface waters." The opinion shows beyond question that the water complained of is overflow waters of the stream, that they have spread out over the adjoining country and they disappear only by evaporation or percolation. If the statement of the law in the syllabus is correct, then they are surface waters.

The principal question in the case seems to be whether the water complained of is surface water or is a stream of water as it was before it escaped from the principal watercourse. Surface water is a common enemy and may be defended against as such. A stream of water is a common friend and cannot be interfered with to the injury of others. To distinguish between these two the law calls one surface water, and has adopted a technical name for the other which is a little unfortunate. It is called "flood water." Now, surface water is generally a flood of water as the term flood is commonly used and understood. The word "flood" is defined in Webster's New International Dictionary as: "A great flow of water; a body of moving water; * * * especially, a body of water rising, swelling, and overflowing land not usually thus covered."

It seems that the court and also the plaintiff in the trial of the case used the word "flood" indiscriminately, sometimes in its technical sense of "flood water," that is, a stream of water, and sometimes as expressing a volume of water. This led to a considerable confusion which it seems to me is perpetuated in the opinion of the court. In the briefs the plaintiff concedes that this water complained of is surface water. The brief states two propositions relied upon to support the judgment: One is that the defendant improperly constructed its bridges and crowded

the water out of the banks of the creek. The other is: "Where a railroad company in the construction of its railroad crosses a natural channel or waterway through which storm or surface waters have been accustomed to flow, it is negligence upon the part of the company to construct its embankment in such manner as to obstruct or dam the natural waterway and thereby occasion damage upon the lands of others."

The opinion says that the water complained of "varied in width from a few rods where it left the stream to a half mile, farther southeast." It "followed a wide and shallow depression in the nearly level land." It varies in depth "from a few inches at the edges to three feet. The petition speaks about this water finally, after two miles overflowing this country, entering into a lake, but the opinion shows that the petition does not mention any lake, but alleges that the waters seek their outlet "toward the Missouri river, into which the waters of Omaha creek naturally flow," without alleging that it ever reaches any river. Some of the witnesses speak of the depression where this water, after flowing over the country for about two miles, is finally absorbed or evaporated, and one or two witnesses called it "the old Blyburg lake bed," but none of them testifies that there is anything like a lake there. Evidently some of this water gets as far as that depression (if the overflow is sufficiently large, which seldom happens) and is absorbed. The trial court found "that the defendant was negligent in its construction of its embankment and its bridges over and across Omaha creek as alleged and set forth in plaintiff's petition, thereby causing the flood waters of Omaha creek to flow back over and across the lands described in plaintiff's petition." The majority opinion finds that this is not true. The plaintiff's petition alleged that the defendant "negligently constructed their bridges, by using piles in such a manner that the piles, which support the bridge structure proper, obstruct the free flow of the water in the channel of said creek and catch and hold debris which further retards and obstructs the flow of wa-

ter, and that by reason thereof the water which would otherwise flow through said channel is crowding out of the channel above and flows over the land on the west side of the defendant's said line of railway, and that when said water is so crowded out of said creek channel by said bridges it flows down, through, over, and across and onto lands in said section 1 and the other lands in said township twenty-seven (27), range eight (8), and in township twenty-eight (28), in said range eight (8), which were farmed and cropped by this plaintiff."

It does not plainly appear from the evidence and the facts or the findings of the court that either the plaintiff or the judge considered this water as a stream or any part of a watercourse. The word "flood" is used sometimes, but apparently in the sense that there is a big body of water spreading over the land, in some places a half mile wide, and, as I said before, the plaintiff in his brief expressly predicates his case upon the proposition that this water is surface water, and the plaintiff insists that in the answer of the defendant "the existence of the flood was admitted." The majority opinion appears to hold that the water complained of is "flood water" in the technical sense. I do not think that the pleadings and evidence in the case will justify such a finding.

Plaintiff has failed to prove the damages allowed by the court, and for that reason the judgment is properly reversed.

WILLIAM W. CRYDERMAN V. STATE OF NEBRASKA.

FILED MARCH 31, 1917. No. 19749.

1. **Criminal Law: HOMICIDE: CORPUS DELICTI: PROOF.** The extrajudicial confession of the defendant is not of itself sufficient evidence of murder in the first degree to establish the *corpus delicti*. There must be also other evidence. But circumstantial evidence is competent for that purpose.

2. ———: ———: ———: ———. If the evidence other than the extrajudicial confession of the defendant establishes that the human being alleged has been killed by violence not self-inflicted, the *corpus delicti* is proved.

3. **Homicide:** SENTENCE: STATUTE. It has long been recognized that section 9179, Rev. St. 1913, is to be liberally construed in favor of justice, as a remedial statute, and that it is the duty of this court to determine, from a consideration of the evidence, whether the death penalty upon conviction of murder in the first degree is warranted by the evidence under the circumstances in the case being considered.

4. ———: REDUCTION OF SENTENCE. In such case, although the defendant is not insane, and he is capable of understanding the nature of his act, still if the evidence shows that his mind was not normal, and was not entirely reliable as a regulator of his conduct, and no rational motive for the crime appears, such evidence will not justify the infliction of the death penalty, and the punishment will be reduced to imprisonment for life.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Affirmed. Sentence reduced.*

Sterling F. Mutz, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe, contra.*

SEDGWICK, J.

By information filed in the district court for Cherry county, Nebraska, the defendant, William W. Cryderman, was charged with the crime of murder in the first degree. It was alleged that he did kill and murder one Nellie Heelan in said county. The jury found the defendant guilty of murder in the first degree, and in their verdict added: "We further find and say that the defendant William W. Cryderman shall suffer death." The court thereupon sentenced the defendant to suffer death by electrocution, and the case has been brought to this court for review.

1. The first contention is that the *corpus delicti* is not proved. An alleged confession of the defendant was in evidence, and it is now insisted that there is no other evidence, proving or tending to prove the *corpus delicti.* The guilt of the defendant must be proved beyond a reasonable

doubt. The extrajudicial confession of the defendant alone is not sufficient evidence to justify conviction. There must be other substantial evidence of the *corpus delicti;* but in proving the *corpus delicti* circumstantial evidence is competent as in proof of other elements of the crime. It has sometimes happened that a defendant has been convicted of murder in the first degree upon a circumstantial and detailed confession of the murder on his part, when in fact no murder had been committed. In view of these circumstances, the rule became established that the death of the supposed victim must be established by other evidence than the confession of the defendant. Afterwards the rule was so extended as to require independent evidence that the death of the victim was by violence and not self-inflicted. Many details are suggested in the brief as elements of the *corpus delicti* which have never been so considered. If there is evidence, direct or circumstantial, other than the confession of the defendant, that the person alleged to have been murdered was killed by violence not self-inflicted, the *corpus delicti* is sufficiently proved.

Mr. Heelan and his wife and daughter resided on a ranch in Cherry county, and in the summer or fall of 1915 this defendant began working for Mr. Heelan on the ranch, and on the 13th of October it was necessary for Mr. Heelan to be away from home for a short time, and Mrs. Heelan procured a neighbor, Mrs. Layport, to stay with her over night in Mr. Heelan's absence. In the evening the dwelling house was burned, and the bodies of Mrs. Heelan and Mrs. Layport were found in the ruins. A search was immediately made for the defendant, and he was apprehended at Valentine the next morning. He freely confessed the murder, and answered, under oath, without hesitation, the questions that were put to him in regard to it, and finally, when his statement had been reduced to writing, he read it and signed it as a correct statement of the manner in which the crime was committed. In this statement he said that he had been hauling hay and coal the day prior to the murder, and he used four horses in hauling coal. While

so engaged he met the two women, Mrs. Heelan and Mrs. Layport, and told Mrs. Heelan that one of the horses had been sick, "and she told me I ought to have known better than to drive a sick horse. * * * Right after the women got home we had more talk about the horse, and I got very angry. The two women got some mail, and were sitting at the table in the kitchen reading the mail, along about nine o'clock. I was out on the back porch thinking things over. I was very angry about the way she had talked to me about the horse, and the more I thought about it the more angry I got. I had a feeling that I must have revenge. The gun, a double-barrel 12-gauge shot gun, was out in the barn. I decided while on the porch that I would go get the gun and kill both of the women. I went out to the barn and loaded the gun, and came back to the window at the southeast corner of the kitchen, and while Mrs. Heelan was reading a newspaper at the northeast corner of the table I shot her in the head. She was killed instantly. I then stepped inside the door and shot Mrs. Layport in the head; she was stooped over near the sink in the kitchen when I shot her. I then wrote the note which was found in the barn, and took it out and left it." He then set fire to the dwelling house in which these two women were, and took one of the horses and rode to Arabia, and stayed there about an hour, and then to Woodlake, and from there by freight train to Valentine. He intended to leave on the railroad the next day, but was arrested by the sheriff. The statement continued: "After killing the women I took some money, a little more than a dollar, out of Mrs. Layport's handbag, and also took Mrs. Layport's watch, from up-stairs, and took it along with me. I also took Mrs. Heelan's rosary. This was down-stairs on the sewing machine when I got it. I also took a comb and a prayer book from down-stairs. There was just the two women and myself present at the time I shot them." This statement was extrajudicial, and would be subject to the suggestion above that it could not of itself be sufficient to establish the *corpus delicti*. The defendant, however, offered himself as a witness upon the

trial, and testified in detail and at great length in corroboration of the statements in the writing that he signed, and also stated in express words under oath that the said writing which he signed was a true and correct statement of the facts. There were other circumstances tending to show that the crime was committed as detailed by the defendant, and sufficient of themselves without the assistance of the extrajudicial statement of the defendant, and probably even without his evidence in open court to establish the *corpus delicti*.

2. The question of the defendant's sanity is presented in the briefs. There is very much evidence in the record tending to show that he was not insane, and there was no witness called to prove the defendant's insanity except the defendant himself. Several expert witnesses testified that the defendant was not insane. There is no doubt from this evidence that the defendant fully understood the nature of his act, and knew the difference between right and wrong. There can be no doubt of his guilt. The question still remains whether the death penalty is too severe. Section 9179, Rev. St. 1913, has been several times applied in cases of this nature. In *Anderson v. State,* 26 Neb. 387, it is said that this statute "is a remedial one, and, like all statutes of that class, is to be liberally construed in favor of justice. The act of reducing the sentence and rendering a new one in accordance with the evidence, is in no sense a commutation of the former sentence. That can be granted only by the executive of the state, and is granted or refused as a matter of discretion. The reduction of a sentence, however, is a matter of right upon which the prisoner may insist when that imposed is in excess of what the evidence will justify. In other words, the statute makes it the duty of this court, when the proper proceedings are had, to review the evidence, and prevent the imposition of punishment which the evidence will not warrant."

In *O'Hearn v. State,* 79 Neb. 513, it was held that under the circumstances there shown punishment of death was excessive, and the sentence was reduced to imprisonment

for life. The court said: "The verdict in so far as it responded to the issues of guilty or not guilty of the crime of murder in the first degree was fully justified." But, because of the defendant's immature years and because of other circumstances shown in the evidence, the court concluded that the death sentence, "taking all the circumstances of the case into consideration, is excessive," and reduced it to imprisonment in the state penitentiary during life.

Hamblin v. State, 81 Neb. 148, was very similar to the facts in the case at bar, so far as the severity of the punishment was concerned. The court said that it was "persuaded that the killing of Rachael Engle was of a most unusual character. There seems to have been no reason for the act. It is insisted by the state that it was prompted by a spirit of wanton, jealous rage, induced by seeing Smith in her company, and that it was a most heartless, cruel, cold-blooded and deliberate murder of an innocent, inoffensive girl, against whom there was no possible cause for ill will or hatred. Viewed from the standpoint of his complete sanity and legal accountability at the time of the shooting, this would seem to be true. She had never given him any offense, had never mistreated him in any way. * * * A solution of the motive which prompted the act is, to the mind of the writer, an impossibility. Plaintiff in error appears to have been most unfortunate and a great sufferer during the greater part of his life. We are fully persuaded that he should never be given his liberty, for he would be a menace to those with whom he should associate. The evidence tends strongly to convince us that, owing to his physical and mental condition, there may be grave doubts as to his responsibility for his acts at the time of the tragedy, and yet he is neither an idiot, an imbecile, nor a maniac. We can find no justification for taking his life, nor should he ever be discharged from confinment."

In a somewhat similar case this language is referred to and approved, and the death sentence reduced to imprisonment for life. *Muzik v. State,* 99 Neb. 496. So that sec-

tion 9179, Rev. St. 1913, has been continually construed to require the reduction of the death penalty to imprisonment for life under circumstances that render that the proper penalty. This defendant at the time of the commission of this crime was a boy of 18 years of age. He had not had the benefits of home for several years, but had led a wandering life with varied experiences. He testified that he had been in a hospital for several weeks, and was "taken in charge for being crazy, * * * my folks and a couple of other parties in town" filed the complaint. The crime was not committed for profit or gain. No rational motive appears. He evidently at first contemplated committing suicide, and when he finally escaped from the scene of the crime he took the prayer book and rosary of his victims, a watch, and $1 in money, but very little of value. There was no evidence as to the value of the watch. He stayed around a small nearby station for several hours, and made no reasonable effort to get beyond the reach of the officers until well along into the succeeding day. As was said in the case last above cited, if his mind was not wholly deranged, it was not normal, and was not entirely reliable as a regulator of his conduct.

The judgment of conviction is affirmed, but the penalty is reduced to imprisonment for life.

SENTENCE REDUCED.

MORRISSEY, C. J., not sitting.

ROSE, J. I do not find in the record any reason for interfering with the verdict of the jury or with the sentence of the trial court.

IRVIN F. WILLMAN, APPELLEE, V. CHARLES H. SANDMAN ET AL., APPELLANTS.

FILED APRIL 14, 1917. No. 19266.

1. **Evidence:** MARKET VALUE. The knowledge on which a witness as to the market value of real estate bases his opinion must not have been acquired long before or after the rights of the parties became fixed, and, where his only knowledge of such value is acquired from one to two years subsequent to such time, it is too remote.
2. **Evidence** examined, and *held* insufficient to sustain the verdict.
3. **Trial:** INSTRUCTIONS: ASSUMPTION OF FACT. "It is error for the court to give an instruction which assumes as established a disputed question of fact. It is for the jury alone to pass upon conflicting evidence." *Terry v. Beatrice Starch Co.*, 43 Neb. 866.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed.*

B. F. Good, Charles H. Denney and *John C. Hartigan*, for appellants.

George W. Berge, contra.

MORRISSEY, C. J.

This is an action to recover damages for fraudulent representations in the exchange of property. In September, 1911, plaintiff was the owner of 320 acres of land in South Dakota, and some personal property in Lancaster county, Nebraska. Defendant Charles H. Sandman was the owner of 160 acres of land in Colorado, and defendant Elmer E. Bevard was a real estate agent residing in the City of Lincoln. Through negotiations conducted by Bevard, plaintiff exchanged his South Dakota land, an automobile, a few village lots, and some cash for the land owned by defendant Sandman in Colorado. Subsequently plaintiff brought this action, alleging that through the false and fraudulent representations of Sandman, made by his agent Bevard, plaintiff had been deceived as to the

value and character of the Colorado land. The petition is very long and sets out in detail the alleged fraudulent representations. Among other things, it alleges that the Colorado land was represented to be worth $12,000, and that plaintiff paid that sum therefor; that it was not worth to exceed $500, and plaintiff was thereby damaged $11,500. It is also alleged that plaintiff went upon the land, made improvements thereon, and attempted to farm the same, and prays for damages for the value of the improvements placed on the land, and the loss of seed, labor and time.

Defendant Sandman denied that there was any joint cause of action against him and the defendant Bevard; denied that Bevard was his agent; alleged that he dealt with Bevard believing him to be the agent of the plaintiff; denied all allegations of fraud on his part; and denied that he received anything in consideration for the Colorado land except a deed for the land in South Dakota; and he brought a deed to this into court and tendered it to plaintiff. He alleged that he purchased the Colorado land in 1909, and paid $45 an acre therefor, and had no knowledge or information that it was not worth the whole amount at which he valued it in the trade with the plaintiff, and denied generally the allegations of plaintiff's petition. Bevard admitted showing the real estate, but denied all other allegations of the petition.

The testimony in behalf of plaintiff was taken chiefly in the form of depositions. At the time the depositions were taken plaintiff evidently was proceeding on the theory that his measure of recovery was the difference between the alleged purchase price and the real value at the time the exchange was made. The trial court properly instructed the jury that the measure of recovery was the difference between the value of the land at the time of the exchange and what its value would have been if the land had been as represented, and properly withdrew from the jury consideration of the other causes of action, set out in the petition. Evidence was admitted showing

the value of the improvements plaintiff made on the land and the extent of his labor thereon. Later this was withdrawn from the consideration of the jury; but, in view of the verdict rendered, it is doubtful if the jury heeded the court's admonition to disregard it.

The petition does not expressly say what the value of the property would be if it had been as represented. But defendants neither demurred nor asked to have it made more definite and certain, and the cause was finally submitted on the theory that it contained the equivalent of such an allegation. The true measure of damages does not appear to have been in contemplation of the plaintiff until the trial of the cause was nearly completed; and the only testimony calculated to sustain the verdict is that of plaintiff, who testified to the effect that, from what he learned in the years 1912 and 1913, he was able to say that, if the land had been as represented, it would have been worth, at the time of the trade, September, 1911, $75 an acre; and he testified that the whole tract was worth not to exceed $500. This is not directly disputed, but there is evidence of exchanges of real estate in the same neighborhood, at that time, at a higher figure. There is also evidence as to the character of the soil, the action of water thereon, and the failure of crops, and some testimony as to the market value of land in the neighborhood. There is the testimony of one witness that he had traded the south half of the section wherein this land lies, about 3 months prior to the deal in controversy, at $100 an acre. This is in excess of the trading value placed on the land. Trading values are generally unsatisfactory. They seldom represent the true market value of property. In the instant case it is quite evident that both parties put trading values on their property far in excess of their true value.

Plaintiff had purchased the South Dakota land at $12 an acre. He traded it in at $18. A used automobile went in at its cost price. The town lots were situated in small villages and were of doubtful value. Defendant Sandman had paid $45 an acre for the Colorado property, and it was

put in at $75. We may well assume that each party knew the other was pricing his property at more than it would bring in cash on the market. These inflated values are entitled to scant consideration. The true measure of damages is that laid down in the court's instructions.

In 1911 plaintiff was living in Nebraska, and alleges that he was in total ignorance of the value of the Colorado land. His testimony as to what he subsequently learned is too remote, and is insufficient to sustain the verdict. The rule is: "The knowledge must not have been acquired long before or after the rights of the parties became fixed." 13 Ency. of Evi. p. 488. In *First Nat. Bank v. Coffin,* 162 Mass. 180, the court said of a witness who acquired his information of values 1½ years subsequent to the transaction: "The testimony might well have been excluded, on the ground that it was too remote in point of time."

The verdict finds so little support in the evidence as to suggest that the jury disregarded the instruction of the court as to the true measure of damages.

Instruction No. 3 is criticized. It reads:

"You are instructed that, to entitle the plaintiff to recover, the burden of proof in this action is upon him to prove by a preponderance of the evidence all the material allegations of his petition not admitted by defendants; that the defendants, or either of them, made representations alleged in the petition, or some of them; that, as against defendant Sandman, Bevard, in making representations, was acting for Sandman, the two having a common design, Bevard being his agent, as alleged in the petition, or that after learning the fraud alleged against him, Sandman ratified and adopted them, accepting the fruits thereof; also that said representations were untrue and were falsely and fraudulently made for the purpose of inducing the plaintiff to enter into the contract for the exchange of properties; that under the circumstances the plaintiff had a right to rely, and did rely, upon the representations so made; that the representations were material representations touching the value and character of the land; that

plaintiff was thereby induced to enter into the contract; that he was thereby damaged, and the amount of such damages. The burden of proof is upon Sandman to prove that any tender back of property was made within a reasonable time after discovery of fraud."

This permits a recovery if the jury should find any of the allegations in the petition to be true, notwithstanding that the court had withdrawn certain of these allegations from their consideration. The concluding clause may also be open to criticism because it omits reference to the proof of fraud.

Instruction No. 7, which we shall not set out at length, also seems to assume matters that are clearly for the jury to determine. It is unnecessary to discuss or determine the other questions raised, as they are not likely to occur on a retrial.

For the errors already pointed out, the cause is reversed and remanded for further proceedings.

REVERSED.

LETTON and CORNISH, JJ., not sitting.

NATIONAL BANK OF COMMERCE, APPELLANT, V. ERNEST BOSSEMEYER ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19061.

1. **Bills and Notes:** INDORSEMENT. Under the provisions of section 5354, Rev. St. 1913, an indorsement "Pay to any bank or banker. All previous indorsements guaranteed"—is not a retrictive indorsement.

2. ———: ———: HOLDER FOR VALUE. In the usual course of business a grain dealer deposited in a bank a sight draft with bill of lading attached, in which the depository bank was payee. It forwarded the draft to plaintiff, its correspondent bank, indorsed generally as above. Plaintiff bank gave credit to the remitting bank for the amount in its general checking account. The custom between the banks was that, if such drafts were protested and returned to plaintiff, they should be charged back to the account of the

remitting bank, and that interest should be charged from the time the credit was given until the proceeds of the draft were received. Plaintiff had no knowledge or notice of any custom between the depositor and the remitting bank, and there is no other evidence as to the intention of the parties. *Held*, that the indorsement and credit passed title to the draft to the receiving bank and made it a holder for value in due course.

3. ———: LIABILITY OF DRAWER. The draft was protested for nonpayment and returned. *Held*, that the receiving bank was entitled to enforce payment of the draft and protest fees against the drawer. Section 5379, Rev. St. 1913.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed, with directions.*

Morning & Ledwith, E. J. Hainer and *A. W. Lane*, for appellant.

Buck, Brubaker & Buck, contra.

LETTON, J.

On January 3, 1911, defendants, who are grain dealers at Superior, Nebraska, drew a sight draft upon a firm in New Mexico for $729 and attached a bill of lading for a car of grain consigned to the order of the drawer. They deposited the draft in the First National Bank of Superior (hereafter termed "the Superior bank"), which gave them credit for the amount upon their checking account. This was done in accordance with a custom whereby defendants deposited such drafts with bills of lading attached and were given credit, with the understanding that, if the draft was not paid, it should be protested, and its amount, with protest fees, should be charged back; that, if interest was charged to the bank by the correspondent, the interest should be charged to the account of drawer. Before the draft was deposited, by mutual agreement the custom was changed and such dishonored drafts were not charged back, but defendants, upon being notified of their return, would give a check to the bank to cover the amount of the draft and protest fees. This was the custom in Superior between banks and grain dealers generally.

The Superior bank sent the draft and bill of lading to plaintiff, its correspondent bank in Lincoln, which credited it with the amount and forwarded the draft and bill of lading to New Mexico through its regular correspondents. The draft bore upon its face the following: "Protest and return immediately with all papers attached if not paid upon presentation." The indorsement by the Superior bank is as follows: "Pay any bank or banker. All previous indorsements guaranteed." Before the draft reached New Mexico the Superior bank had suspended payments and been taken in charge by the comptroller of currency. Defendants notified the drawee not to pay the draft, caused the car to be delivered, and collected the amount due from him. The draft was protested and returned to plaintiff. This action was brought against the drawers by plaintiff as a holder for value, as defined in section 5344, Rev. St. 1913. Five similar transactions are alleged as causes of action in the petition.

Several defenses are set up: (1) That the drafts were deposited with the Superior bank for collection only, to the knowledge of plaintiff, and were received by plaintiff from that bank for collection. (2) That, since the Superior bank charged interest until the collection was made and charged the drafts back if not paid, it was not an owner or holder in due course, and the same relation as to the drafts being deposited for collection existed between the Superior bank and plaintiff. (3) That at the time the drafts were received the Superior bank was insolvent, which was known to plaintiff and to the officers of the Superior bank, but unknown to defendants, and that when these conditions became known defendants rescinded the transaction. The action was tried to the court without a jury, which found generally for the defendants and rendered judgment of dismissal. Plaintiff appeals.

The evidence is undisputed that the Superior bank had only one account with plaintiff; that as soon as such drafts were received by plaintiff it gave credit to the Superior bank for the amount of the same and usually charged

interest from that time until it received the proceeds from its correspondent bank; that if any draft was protested and returned it charged back the amount of the draft and protest fees to the Superior bank, and that this is the usual custom among bankers. Plaintiff had no notice of the insolvency of the Superior bank until January 9, 1914, and had no knowledge of the dealing between the drawer and the Superior bank, but received these drafts in the usual course of business, relying upon the indorsements. The assistant cashier of the plaintiff bank testifies that the drafts were sent to plaintiff, together with checks on Lincoln and other banks, foreign bills of exchange, and other items, with deposit slip "Enclosed for credit and advice," and were acknowledged in the following form:

NATIONAL BANK OF COMMERCE.

As per your letter of 3:

We credit subject to payment	We transfer to	We enter for collection
634 2 43 36 3 28	New York Chicago	

Items merely sent for collection were entered under the column "We enter for collection." When plaintiff received notice of the failure there was a credit of $3,608.36 on its books to the credit of the Superior bank. This amount fluctuated until March 28, when there was $4,102.52 on hand, which was the amount at the time of the trial. The plaintiff bank had also loaned to the Superior bank $10,000 upon its note, which was secured by collateral to the amount of $14,000; $1,000 of which has been collected and the remainder is of questionable value. The drawer testified that the drafts were deposited with the Superior bank for collection only. The question for determination is whether the draft was received by the plaintiff for collection, the title and ownership remaining in the Superior bank, or, did plaintiff become a holder in due course by the indorsement and receipt of the draft and the crediting of

the Superior bank with the amount thereof? Defendants contend that the indorsement is restrictive and shows that the title did not pass; that, since the custom was that interest should be charged between the date of the receipt of the paper and the receipt of the money in payment thereof, and because if not paid it was the custom to charge the amount and protest fees back to the account of the Superior bank, the draft was taken for collection only.

Is the indorsement restrictive? Whatever may have been held before the enactment of the negotiable instruments act, it is clear that this question must be determined by the provisions of that statute. Section 5354, Rev. St. 1913, is as follows: "An indorsement is restrictive which either: First—prohibits the further negotiation of the instrument; or, second—constitutes the indorsee the agent of the indorser; or, third—vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

There is nothing on the face of this indorsement which prohibits the further negotiation of the instrument or constitutes the indorsee the agent of the indorser, or vests title in the indorsee in trust for the use of some other person, and hence, by the most elementary principles of statutory construction, the plain meaning of the language must be observed, and it must be held that the indorsement was not restrictive.

In *Bank of Indian Territory v. First Nat. Bank*, 109 Mo. App. 665, a case which was decided before the negotiable instruments act went into effect in that state, it was held, without any discussion of the reasons, that an indorsement such as this was a restrictive indorsement. In three cases decided in that state after the act was in force (*National Bank of Rolla v. First Nat. Bank*, 141 Mo. App. 719; *National Bank of Commerce v. Mechanics American Nat Bank*, 148 Mo. App. 1; *Citizens Trust Co. v. Ward*, 195 Mo. App. 223) the same ruling was made; but in none of these cases was the language of the statute con-

sidered, and the holding is placed upon the authority of the first case, which, as we have seen, was decided before the act took effect. These cases are not authority upon the proposition as to whether such an indorsement is restrictive under the provisions of the act. Furthermore, any bank receiving a draft with such an indorsement has the right to again indorse it in blank or payable to any particular bank or person. This, of course, it would have no power to do if the indorsement was restrictive. If, however, the words "for credit," "for account," "for collection and return," had been added, the character of the indorsement would have been changed entirely, and it would have been restrictive, showing upon its face that the indorsee bank took it only as a collecting agent, and not as a holder for value. *White v. Miners Nat. Bank,* 102 U. S. 658; *Commercial Bank of Pennsylvania v. Armstrong,* 148 U. S. 50; *Ditch & Bros. v. Western Nat. Bank,* 79 Md. 192, 23 L. R. A. 164; *Murchison Nat. Bank v. Dunn Oil Mills Co.,* 150 N. Car. 718; *Fayette Nat. Bank v. Summers,* 105 Va. 689, 7 L. R. A. n. s. 694; *United States Nat. Bank v. Geer,* 55 Neb. 462.

In *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville,* 58 Ohio St. 207, 41 L. R. A. 584, it is pointed out that the practice of indorsing checks "for collection," "for account,"had become almost universal, but when it was decided by the supreme courts of New York and Missouri that the drawee bank could not recover back money paid upon a forged draft in the one case from a collecting bank, or in the other from the bank owning the draft, "it startled the banks located in large cities, and awakened them to the dangers attending the payment of such drafts or bills, and the result was that in the year 1896 the clearing house in the city of New York adopted a rule to the effect that its members should not send through the exchanges any paper having any qualified or restrictive indorsements, such as 'for collection,' or 'for account of,' unless all indorsements were guaranteed by the bank sending such paper. This action was soon followed by the clearing houses in other

cities, and in some of them all indorsements are required to be either in blank, or 'pay to.....or order.' By this action of the clearing houses, indorsements 'for collection,' or 'for account of,' have fallen into disuse, and the banking business of the country is now done, almost universally, upon unrestricted indorsements." We conclude, then, that the indorsement by the Superior bank was general, and not restrictive.

Does the fact that, if protested, the Lincoln bank was entitled to charge back the amount of the draft and protest fees constitute it merely an agent for collection and not a holder in due course? While there is some conflict in the authorities, the better view is that the deposit of a check or draft in a bank with a general indorsement and the giving of credit for its amount by the bank to the depositor, in the absence of other evidence as to the intention of the parties, passes the title to the bank and makes it a holder for value, entitled to recourse on prior indorsers upon the protest of the paper. In other words, when such a state of facts is proved there is a *prima facie* case made that the title has passed, and the fact that it, the receiving bank, may charge back a protested draft does not affect the relation. In *Higgins v. Hayden,* 53 Neb. 61, before the enactment of the negotiable instruments act, it was held that a bill of exchange drawn to the order of a bank by its customer, the amount of which was placed to his credit, and on which he drew and the bank paid checks, became the property of the bank; such conduct being inconsistent with the theory of a bailment for collection. 2 Michie, Banks, sec. 127; 1 Morse, Banks and Banking, sec. 187; 2 Morse, Banks and Banking, secs. 573, 575; *National Bank v. Everett,* 136 Ga. 372; *Dymock v. Midland Nat. Bank,* 67 Mo. App. 97; *Brusegaard v. Ueland,* 72 Minn. 283; *Jefferson Bank v. Merchants Refrigerator Co.,* 236 Mo. 407, 415; *Ditch & Bros. v. Western Nat. Bank,* 79 Md. 192, 23 L. R. A. 164; *Burton v. United States,* 196 U. S. 283; 25 Sup. Ct. Rep. 243, and cases cited; *Noble v. Doughten,* 72 Kan. 336, 3 L. R. A. n. s. 1167; *Bank of the Metropolis v. New*

England Bank, 1 How. (U. S.) 234; *Fayette Nat. Bank v. Summers,* 105 Va. 689, 7 L. R. A. n. s. 694; also cases cited in 7 C. J. p. 635, note 27, p. 599, note 43.

That credit to the drawer was entered by the Superior bank in a passbook in which was printed, "This bank in receiving out of town checks and other collections acts only as your agent and does not assume any responsibility beyond due diligence on its part," cannot affect the right of the plaintiff to recover in this case. The fact that the drawers put the paper in circulation, and that the Superior bank was thus able to negotiate it as its owner and holder, received full credit for it, the plaintiff bank having no knowledge of any infirmity, makes it a holder for value as defined in section 5344, Rev. St. 1913.

The Minnesota case, *In re State Bank,* 56 Minn. 119, is not in conflict with these views, since in that case the controversy was between the original parties, and not between a holder for value without notice, and the drawer, and such was the relation between the parties in the other cases cited in which a printed notice was on the passbook. A similar case is *South Park Foundry & Machine Co. v. Chicago G. W. R. Co.,* 75 Minn. 186.

The fact that a custom between banks and grain dealers is that, when any draft bearing a general indorsement was unpaid, it was protested and either charged back or paid by the drawer is an argument in favor of the plaintiff's position, and not in favor of the defendants, because such a custom clearly recognizes the liability of the drawer to pay a dishonored draft to the indorsee who has failed to collect the same. Even though by the custom between the drawer and the Superior bank the drafts were taken only for collection, there is absolutely no proof in the record that the plaintiff had any knowledge whatever of this state of affairs. It received the draft with the general indorsement and credited the Superior bank with the amount in its deposit account which was drawn upon from day to day. Under section 5379, Rev. St. 1913: "The drawer by drawing the instrument admits the existence of the payee

and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder." The benefit of this liability in case of dishonor was transferred to plaintiff by the general indorsement. When the Superior bank closed its doors its assets became the property of the receiver for the purpose of liquidating its affairs. The rights of its receiver against the plaintiff or plaintiff's right to apply the fund in its hands to the payment of the debt of the Superior bank are not involved in this case, since the receiver is not a party to the suit, and the case must be determined without regard to this fund. That the bank was in fact insolvent at the time of the deposit, under the circumstances of this case, does not seem to be material: First, because plaintiff bank took the draft in good faith for value without notice or knowledge of any infirmity in the title; and, second, because the drawers between the time of the deposit of the first drafts and the closing of the bank drew out over $4,000 more than the credit given, and within a few hundred dollars of the total amount deposited within this period, leaving the account of the drawers substantially as it was before the drafts were deposited.

Under the provisions of the negotiable instruments act and the evidence in the case the defendants are liable as drawers for the full amount of the drafts and protest fees. The judgment of the district court is reversed and the cause remanded, with directions to enter judgment for the amount due.

REVERSED.

ROSE, J., took no part in the decision.

HAMER, J., dissenting.

I am unable to agree with the views expressed in the majority opinion. As I understand the facts in the case the defendants, the Bossemeyers, were dealers in grain at Superior. They were accustomed to draw sight drafts on the person to whom they shipped grain. The draft was expected to cover the full amount of the shipment, and it was expected that it would be paid out of the proceeds of the grain when it reached its destination. A draft would be drawn upon the person who was expected to receive the grain and for the price of the grain. There would be attached to that particular draft a bill of lading for the grain shipped. We will take one of the drafts and copy it with the indorsements upon it, and also the bill of lading attached to it, with its indorsements:

"Bossemeyer Bros., Grain Dealers. No. 1809.
"Superior, Neb., Jan. 3, 1914.

"At sight, pay to the order of First National Bank $729, seven hundred twenty-nine and 00/100 dollars.

"Bossemeyer Bros., By P. Bossemeyer.

"Young & Wheeler, Magdalena, N. Mex.

"Protest and return immediately with all papers attached if not paid upon presentation."

Indorsed on back: "Pay any bank or banker. All previous indorsements guaranteed. 76-137. Jan. 3, 1914. 76-137. First National Bank, Superior, Nebraska.

"Pay to the order of any bank or banker for collection and remittance. Jan. 5, 1914. National Bank of Commerce. 43-3 Lincoln, Nebrasaka. 43-3. James A. Cline, Cashier.

"Mechanics American National Bank, St. Louis, Mo. Pay to order of any bank or banker. Prior indorsements guaranteed. Jan. 6, 1914. J. S. Calfee, Cashier. (In red ink) Indorsement erased.

"Pay to the order of any bank or banker. Prior indorsements guaranteed. Jan. 7, 1914. Drovers National Bank. 18-22 Kansas City, Mo. 18-22."

As the bill of lading is very long we will copy only such parts of it as seem material:

"The Atchison, Topeka & Santa Fe Railway Company
"Order Bill of Lading—Original. Shipper's No. 1809.

"Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Superior, Neb., Jan. 3, 1914, from Bossemeyer Bros., the property described below, in apparent good order, except as noted. * * *

"The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper." Indorsed across above paragraph in red ink is the following: "A. T. & S. F. Ry. Co. Received Jan. 3, 1914. Freight Office. Superior, Nebr. * * *

"Consigned to order of Bossemeyer Bros. Destination, Magdalena, State of N. Mex., County of ———. Notify Young & Wheeler at Magdalena, State of N. Mex., County of ———. Route ———. Car Initial, A. T. & S. F. Car No. 27601.

No. Packages	Description of Articles and Special Marks.	Weight Subject to Correction	Class or Rate	Check Column.
400 100	Sax Corn Sax Cracked Corn 50 m car ordered	40000 10000 50000		

"Bossemeyer Bros., Shipper, Per H.

G. W. Hall, Agent,
By H. O. E.

"(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)"

The drafts appear to have been drawn and attached to bills of lading so as to enable the collection of certain amounts due for grain that had been shipped to customers

of the Bossemeyers. It was the custom of the First National Bank of Superior to send the draft and bill of lading to their correspondent. At the time the draft and bill of lading were received there would be a credit given to the Bossemeyer Brothers by the First National Bank of Superior, and, if there was a failure to collect, the amount would be charged back and the credit of Bossemeyer Brothers reduced accordingly. This sort of business had been conducted by the Bossemeyers with the First National Bank of Superior for perhaps 25 or 30 years. There were five of these drafts each with its bill of lading attached. The shipments were made to various places in other states than Nebraska. The places were of course mentioned in the bills of lading, as also the person expected to pay named in each.

The National Bank of Commerce of Lincoln, Nebraska, brought this action against the defendants, the Bossemeyers, as makers of five sight drafts aggregating about $3,200. The case was brought in the district court for Nuckolls county, and was tried before the judge of that court; a jury being waived. It was the contention of the defeated plaintiff that the sight drafts were negotiable, and that the defendants, the Bossemeyers, having made them, were liable thereon.

The defendants interposed defenses: (1) That the plaintiff was not the owner of the drafts; (2) that the drafts were deposited for collection only; (3) that the plaintiff did not intend to purchase the drafts; (4) that each draft and the bill of lading attached thereto were inseparable, and that the drafts represented perishable goods and could not be purchased by the bank, even if it wished to purchase the same; (5) that the plaintiff bank did not pay for the drafts; (6) that any credit given to the First National Bank of Superior was not drawn out; (7) that sight drafts with bills of lading attached are not covered by the negotiable instruments law, and that these drafts with the bills of lading attached showed that the defendants were not liable as drawers of commercial paper; (8)

that the drafts were taken by the First National Bank of Superior for collection and were not purchased by it, but were taken by it to be transmitted to the plaintiff bank for collection; (9) that drafts and bills of lading were received by the First National Bank of Superior at a time when it was insolvent.

An examination of the testimony convinces the writer that the contention made by the defendants is correct. It appears to me that the five sight drafts with their respective bills of lading attached are not in any sense negotiable instruments, and were not intended to circulate as commercial paper subject to the provisions of the negotiable instruments law, but that the scheme was devised for the collection of the amounts due on said shipments of grain shown by the bills of lading. The drafts and bills of lading were received from the 3d to the 7th of January, 1914, and on the next day, January 8, 1914, the bank failed and quit doing business. The reply of plaintiff admits that, "accompanying each of said several sight drafts, there was a bill of lading covering in each case one carload of grain shipped by the defendants to their own order, said several bills of lading being substantially the same as the said copies attached to said amended answer, excepting that each bore the indorsement of Bossemeyer Brothers upon the back thereof as follows: 'Bossemeyer Bros.'"

There is no statement in the reply that the deposit of the First National Bank of Superior with the plaintiff bank was exhausted, or that this money contained in the drafts, and for which in the first place the First National Bank of Superior was given credit by the plaintiff bank, was drawn out by the First National Bank of Superior; neither is there any allegation in the reply of the plaintiff bank or in its petition that it paid anything for the drafts and bills of lading, and an examination of the evidence shows that the plaintiff bank never paid anything for the drafts. The statement contained in the syllabus of the majority opinion that "all previous indorsements guaranteed" is not a "restrictive indorsement" is not sustained in the face of the

evidence which clearly shows that the indorsement was only to enable the collection of the price of the grain contained in the bill of lading.

Neither am I able to find any evidence which satisfactorily establishes to my mind that title to the drafts passed "to the receiving bank and made it a holder for value in due course." The evidence shows beyond all controversy that the receiving bank did not pay even one dollar for the drafts. I have never seen a case that seemed to me to have less to sustain it than this one. If the rule sought to be established and maintained in this case is finally declared and fixed, then no country bank can send a collection to a city bank in this state without running the greatest risk of having it appropriated by the city bank without any consideration therefor, and in the face of the evidence and the uncontroverted facts. Such appropriation would be regardless of all the rights of the customers of the country bank. In this case there was no controversy between the First National Bank of Superior and the Bossemeyer Brothers. The only controversy is with the National Bank of Commerce, which up to this date seems to have successfully appropriated the grain shipped by the Bossemeyers. While not the grain itself, the judgment amounts to the price thereof.

According to Bossemeyer's testimony Weil did not claim that his bank had suffered in any way. The jury in this case was waived and the case was tried to the district judge sitting as the district court. His finding is like the finding of a jury. I do not see what business we have to set it aside.

In *Whisker v. Vera Cruz Coffee Co.*, 95 Neb. 119, this court held: "The finding in an action at law, tried by the district court without the intervention of a jury, is entitled to the same consideration as the verdict of a jury, and will not be set aside unless it appears to be clearly wrong."

"The findings of the district court in a law action tried to the court without the intervention of a jury are entitled

to the same weight as the verdict of a jury, and will not be disturbed unless the evidence is clearly insufficient to support them." *Stanisics v. Hartford Fire Ins. Co.*, 83 Neb. 768.

"A finding of fact made by a court in the trial of an action at law is entitled to as much respect as the verdict of a jury, and, if there is competent evidence to support the finding, it will not be disturbed on appeal." *Dorsey v. Wellman*, 85 Neb. 262.

Where an action at law is tried in district court without a jury, findings of fact have the same force as a verdict. *National Engraving Co. v. Queen City Laundry*, 92 Neb. 402; *Darr & Spencer v. Kansas City Hay Co.*, 85 Neb. 665; *Providence Jewelry Co. v. Gray Mercantile Co.*, 92 Neb. 633.

On the first page of the Bossemeyers' pass book there was the following: "First National Bank, Superior, Nebraska. In account with Bossemeyer Bros., Superior, Nebraska. This bank in receiving out of town checks and other collections, acts only as your agent and does not assume any responsibility beyond due diligence on its part, the same as on its own paper." No one makes the contention that the First National Bank of Superior became the owner of these drafts and bills of lading. If it did not, then how did the plaintiff bank become the owner of the same? As the First National Bank of Superior never owned these drafts and the bills of lading it could not transfer to any one a good title. It had them for the purpose of making collection. It had no more authority to treat them as its own than a lawyer would have to appropriate the collections placed in his hands. The National Bank of Commerce acknowledged receipt of said sight drafts as follows: "With credit, subject to payment." This shows that there was no absolute and unconditional credit, but the credit was to be subject to payment only.

It is in the testimony that there was an understanding between the First National Bank of Superior and the defendants that the amount of the sight drafts should be

charged back to defendants and against their deposit account if collection should not be made from drawees of the sight drafts. At the same time, if the First National Bank of Superior was insolvent on the 9th of January, 1914, when it closed its doors, it must have been insolvent on the day before and for several days preceding that. It might have been insolvent, and if permitted to do so it might have honestly collected these drafts for the Bossemeyers. If it did not have any authority to collect the money and keep it, it is difficult to understand what right the plaintiff bank would have had to keep it if it had succeeded in collecting it. But it did not succeed, for the Bossemeyers collected the drafts themselves. We are not told in what way the Bossemeyers perpetrated a fraud upon the plaintiff bank. Unless they wronged the plaintiff bank in some way, it has no right to recover anything against the Bossemeyers.

The bank failed on the morning of the 9th of January, 1914. On the morning of the 10th of January, 1914, the First National Bank of Superior had on deposit in the plaintiff bank $8,588.08 according to the testimony of Carl Weil, the vice president. Therefore, there could have been no difficulty in charging back the amount of the uncollected drafts and bills of lading, as they only amounted to about $3,200. He also testified that the First National Bank of Superior had only one account with the plaintiff bank, "the checking account," and that all items forwarded to it were handled through that account, whether indorsed for collection and remittance, or for credit and advice. But he followed that up with a statement: "By agreement with the bank that we give them credit for all items in their checking account and permit them to check against it and have the use of the money, yes, sir." Also, that it was his understanding that items not collected should be charged back. "We were to be recompensed for anything that we could not collect." "Q. I see the dates are stamped on here with a rubber stamp in the collection column. What does that signify, if it signifies anything? A. It is merely, possibly, a careless manner of the clerk in dating."

When he was first asked about the matter he answered that the balance of the First National Bank of Superior on the morning of the 10th of January, 1914, was, "speaking from memory, I think about $1,000." An examination of the record showed $8,588.08. Subsequently he testified that the amount on the morning of the 13th was $4,091.82, "where it remained until the morning of the 28th, $4,096.08; on the morning of March 28th, $4,102.52, at which amount it now stands." The testimony of this witness suggests that he had designs on the grain of the Bossemeyers, or he desired to get a fund ahead to be used as collateral for certain other indebtedness of the First National Bank to his bank.

Ernest Bossemeyer testified that the First National Bank of Superior would charge them interest on the amount of the drafts made from the date they received them until they were collected. His testimony shows a slip of this sort where the Bossemeyer Brothers were charged in four days on this sort of a credit for interest, $14.29. This arrangement appears to have been extended also to the National Bank of Commerce, which charged the defendants in the same way, through their correspondent, the First National Bank of Superior, and also for protest fees.

The plaintiff bank at Lincoln received the drafts to collect them if it could out of the proceeds of the grain when the money should be paid on the drafts according to the bills of lading. The bank at Lincoln gave the bank at Superior a book credit subject to be charged back if the money was not collected from the drawees to whom the grain was sent. When the bank at Superior failed the Bossemeyers immediately countermanded payment of the drafts by wiring the persons to whom the grain was sent, who refused payment of the drafts. Of course the grain had all along been the property of the Bossemeyers because the bank at Superior had paid nothing for it; neither had the bank at Lincoln. The Bossemeyers had a credit with the bank at Superior which they might have checked against, but they did not. The bank at Lincoln was a cor-

respondent of the bank at Superior, and gave that bank a credit which it might have checked against, but it did not. The full amount of the credit in both banks was dependent upon the contingent fact whether the proceeds of the grain should be collected. If not collected, then the banks would lose nothing because they had paid nothing. Whatever is collected by the bank at Lincoln in its action against the Bossemeyers is taken out of their pockets without the Lincoln bank paying anything. Suppose the bank at Superior had kept the drafts until after Bossemeyers wired the purchasers of grain not to pay and then had refused payment, would the bank at Superior have had any sort of valid claim against the Bossemeyers? If so, why not? Of course it must be because it had paid nothing and it had lost nothing. The same is true of the bank at Lincoln. It paid nothing. Neither did it lose anything. It made an entry on its books, but that was not payment. That was a way of keeping an account of the transaction. If the bank at Superior had stayed in business the drafts would probably have been paid by the persons to whom the grain was sent, but because it went out of business the drafts were not paid. Should Bossemeyers lose their money because the bank at Superior failed? That appears to be the effect of the majority decision. The man who buys my horse from the man who has unlawfully appropriated the horse gets no title, and the horse is still mine. The rights of parties where a note has been discounted by a bank and the proceeds credited on the books of the bank to the person from whom it was purchased have been repeatedly stated by text-writers. I quote from 1 Daniel, Negotiable Instruments (6th ed.) sec. 779*b*, as follows: "The apparent purchase must have been a purchase in fact and not a mere bookkeeping entry. Mere discount and credit do not of themselves constitute a *bona fide* purchaser for value. To occupy that position the holder must actually have parted with something of value for the note. Thus, where a bank discounted a note for a company, and credited it with the amount, the credit, on account of other deposits, subse-

quently increasing, so that at the time of suit on the note the bank had actually paid nothing for it, it was held not a purchaser for value."

In Eaton and Gilbert, Commercial Paper, sec. 54, it is said: "A bank by merely discounting a bill or note and placing the proceeds to the credit of the payee does not become a holder for value; but where the bank, on the strength of such credit, has relinquished securities in its possession or made advances to or paid the checks of the payee, it becomes a holder for value."

In 7 Cyc. 929, it is said: "While the authorities are not entirely uniform upon the subject it is fairly well settled that a bank, by discounting negotiable paper, placing the same to the credit of the depositor, and honoring his checks or drafts, surrendering to him securities, or in some other manner making advances and extending its credit on the faith of such deposit, thereby becomes a holder for value. But the mere discounting and crediting of the amount on the depositor's account, without making payment or incurring any increased obligations or liabilities, is not sufficient."

In 4 Am. & Eng. Ency. of Law (2d ed.) 298, it is said: "Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of such paper, it is not a *bona fide* holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not drawn out, the bank is held subject to the equities of prior parties, even though the paper has been taken before maturity and without notice."

In *Thompson v. Sioux Falls Nat. Bank,* 150 U. S. 231, it is said: "The mere credit of a check upon the books of a bank, which may be canceled at any time, does not make the bank a *bona fide* purchaser for value. If after such

credit and before payment for value upon the faith thereof, the holder receives notice of the invalidity of the check, he cannot become a *bona fide* holder by subsequent payment."

In *Central Nat. Bank v. Valentine,* 18 Hun (N. Y.) 417, the court said: "The mere giving of credit by entering the amount on the books, and not actually parting with a dollar upon the strength of the indorsement, cannot be regarded parting with value in the sense which the law contemplates. The parties in whose favor the credit was given might never draw or appropriate any portion of the fund."

Other authorities along the same line are: *Dykman v. Northbridge,* 80 Hun (N. Y.) 258; *Clarke Nat. Bank v. Bank of Albion,* 52 Barb. (N. Y.) 592; *Thompson v. Sioux Falls Nat. Bank,* 150 U. S. 231; *Manufacturers Nat. Bank v. Newell,* 71 Wis. 309; *Citizens State Bank v. Cowles,* 180 N. Y. 346; *Davis v. Elmira Savings Bank,* 161 U. S. 275; *Ætna Nat. Bank v. Fourth Nat. Bank,* 46 N. Y. 82.

The legislation mentioned in the majority opinion is not aimed to take the property of any person without just compensation or without due process of law, and if that was its purpose such legislation would be void. Const. Neb. art. I, secs. 3, 21; also, Const. U. S., Amend. XIV, sec. 1.

IN RE ESTATE OF HENRY KELLER. LOUIS KELLER, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED APRIL 14, 1917. No. 19234.

1. **Parties:** INTERVENTION. Since the amendment of 1887, appearing now as sections 7609-7611, Rev. St. 1913, any person claiming an interest in the subject-matter of an action may intervene at any time before trial, as a matter of right.

2. **Pleading:** INTERVENTION: STRIKING ANSWER. Pending the administration of the estate of one H. K., who died intestate, a petition was presented to the county court by one L. K., claiming to be a brother of decedent, praying that he be found and decreed to be

the sole heir. The state of Nebraska by answer and cross-petition denied the relationship and heirship, alleged that the intestate was without kindred or wife, and asked that the court decree that the estate should escheat. The court found that L. K. was not a brother and heir. On appeal to the district court a like petition and answer were filed. On motion of L. K. this answer was stricken from the files. *Held*, that, although the pleading was irregular in form, it alleged an interest of the state in the subject-matter of the litigation adverse to the petitioner, and it was error to strike it from the files.

3. **Appeal:** TIME OF ENTRY. After a new trial was granted, leave to file such pleading was again requested and denied. The petitioner had the verdict and judgment. *Held*, that an appeal brought within six months of the final judgment is in time.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Reversed.*

Wllis E. Reed, Attorney General, Dexter T. Barrett and *W. T. Thompson*, for appellant.

J. E. Willits and *J. W. James, contra.*

LETTON, J.

Henry Keller died intestate in 1904. An administrator of his estate was appointed and qualified. Pending the administration Louis Keller filed a petition in the county court, in which he alleged that he is a resident of Chicago; that he is the only brother of Henry Keller, deceased; that Henry Keller was never married, had no other brothers or sisters and no surviving father or mother. He prayed for a decree naming the petitioner as the sole heir at law.

The state of Nebraska filed an answer denying his heirship, and alleging that the property had escheated to the state. After a hearing the court found that Louis Keller was not the brother of the deceased. Louis Keller appealed to the district court and filed a like petition. Afterwards the state of Nebraska asked leave to file an answer, which was tendered, denying the petitioner's claim, and asking affirmative relief. Objections were filed by the petitioner, and leave was refused on June 24, 1914. Evidence was taken and the case argued and submitted. A verdict was re-

turned against the petitioner. He filed a motion for a new trial, which was sustained, the verdict set aside and a new trial granted. Afterwards the state, by the attorney general, moved the court to reinstate "the petition of intervention" and be allowed to defend against the claim of appellant. This request was denied. The record recites that on the second day of February, 1915, counsel for Louis Keller being present, "the court announces that John Snider, a reputable attorney and counselor at law of Hastings, Adams county, Nebraska, is present and will be permitted by the court to appear *amicus curiæ,* and to examine the jury on voir dire examination, and make statement of the case to the jury, and conduct cross-examination of the witnesses, and make argument and present his view of the evidence to the jury." Mr. Snider had previously appeared in the case for the state. The trial proceeded, evidence was taken, argument had, the jury were instructed and returned a verdict finding that Louis Keller is the brother and sole heir at law of Henry Keller, deceased. A motion for a new trial was filed by the state. Keller filed a motion to strike it from the files, which was sustained. The court found generally in favor of the petitioner, reversed the finding and judgment of the county court, directed the clerk to certify the proceedings and judgment to the county court, and ordered the county court to cause the estate to be finally settled and distributed in accordance with the judgment.

From this judgment the state appeals.

LETTON, J. (after stating the facts).

The state maintains that the court erred in striking its pleading from the files, that intervention is a statutory right in this state, and not a privilege to be granted or denied at the discretion of the trial court. Prior to 1887 no one not a party could take part in any pending action unless by leave of court. In 1887 an act was passed which now appears as sections 7609-7611, Rev. St. 1913. Under this statute we have held that persons claiming title to the

subject-matter may intervene at any time before trial (*McConniff v. VanDusen,* 57 Neb. 49; *State v. Holmes,* 60 Neb. 39), and that one may become a party to the suit without leave of court (*Spalding v. Murphy,* 63 Neb. 401). The first four paragraphs of the pleading sought to be filed by the state consist of an answer to the petition; the fifth paragraph, however, is an affirmative plea that Henry Keller died intestate without kindred or wife, and the prayer is that the court so find and should decree that the estate should escheat to the state of Nebraska. This pleading, although irregular in form and not strictly in conformity with the statute, alleged an interest of the state in the subject-matter of the proceeding adverse to the petitioner, raised a proper issue to be tried, and it was error to strike it from the files.

Appellee contends that since the state did not appeal from the order of June 24, 1914, denying it the right to file its pleading, the matter became *res judicata,* and since this appeal was not taken within six months from that time this court has no jurisdiction to consider this point. But the verdict in the first trial was against the petitioner and in line with the state's contention, and hence there was no reason for it to appeal. It was only after a retrial had been ordered and the subsequent application to file the answer had been denied that the state's interests were prejudicially affected and it had anything to appeal from. This appeal was taken within six months from the final judgment, and vests this court with jurisdiction.

The petition does not allege of what the estate of deceased consisted, nor that after the debts and expenses of administration are paid there will be anything left for distribution. In this respect it is probably subject to a demurrer, but since no attack was made upon it, and it was stated at the argument that the administrator has in his hands personal property, the distribution of which will be governed by the decision, we will assume it states a cause of action. It is essential to a due performance of the duties of the administrator that the court ascertain and de-

termine to whom such property belongs, since without a decree finding to whom it shall be distributed he will act at his peril. So far as now appears the property belongs either to the petitioner or to the state of Nebraska, and this issue should be determined upon proper pleadings and evidence in a proceeding to which each claimant is a party. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

HAMER, J., not sitting.

SUNDERLAND BROTHERS COMPANY, APPELLEE, v. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED APRIL 14, 1917. No. 19285.

1. **Commerce:** RECIPROCAL DEMURRAGE ACT: VALIDITY. The provisions of the reciprocal demurrage act (sections 6159-6167, Rev. St. 1913) relating to intrastate and interstate commerce are held to be separable, and the act, as applied to commerce within the state is held not to violate the Constitution of the United States or the Constitution of the state of Nebraska.

2. **Carriers:** RECIPROCAL DEMURRAGE ACT: CONSTRUCTION. Section 6162, Rev. St. 1913, construed, and *held*, that the duty of a railway company to make prompt delivery of cars is not ended when the cars are placed upon a "hold track" to await orders from the consignor or consignee, but the running of the time allowed by such section for delivery is only suspended while cars are so held.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

B. P. Waggener, J. A. C. Kennedy and *Guy C. Kiddoo,* for appellant.

Baldrige, Keller & Keller, contra.

LETTON, J.

This action is brought to recover damages under certain provisions of sections 6159-6167, Rev. St. 1913 (known as

the reciprocal demurrage act), which require freight to be moved not less than 50 miles in 24 hours under liability for damages of $1 a car (unless prevented by a large number of contingencies, which are matters of defense) and which impose damages of $1 for each day cars are delayed in delivery.

Plaintiff is a dealer in building materials at Omaha. The defendant is a common carrier operating an interstate railroad. The petition alleges that at certain specified times from July, 1909, to December, 1912, building material in car-load lots was delivered at Louisville, Nebraska, with instructions to ship to points within the state over the defendant road; that bills of lading were issued for each shipment; that defendant failed to transport the shipment within the time provided by law. It is also alleged that the defendant failed to place loaded cars at a place accessible for unloading within the time required by law, and that the plaintiff had presented its claim for damages more than 60 days prior to the commencement of the suit.

In answer, defendant alleges that the statute prescribing a time limit for the movement of freight is in violation of the Constitution of the United States and the Constitution of the state of Nebraska; that, since congress has asserted its authority over interstate commerce, all regulations of the state of Nebraska affecting the carriage of goods by railroads and common carriers between states have been superseded; and that the trains and cars referred to in the petition were engaged in interstate commerce. As to the complaint of delay in placing the cars for unloading, the answer alleges that the plaintiff has three yards in Omaha in different sections of the city, and that at plaintiff's request the cars were not placed upon the public delivery track, but for the accommodation of plaintiff were placed upon a "hold track" of defendant to await plaintiff's order for delivery to its several yards.

A jury was waived and trial had to the court, which found that the statute was constitutional; that the defendant made 295 days' delay in the shipments and 345 days'

delay in the placing of cars after arrival. Judgment was rendered for $640 and an attorneys fee of $250.

The first complaint is that the statute violates both the Constitution of the state and of the United States, because it is an interference with and burden upon interstate commerce; that its provisons are so intermingled as to intrastate and interstate commerce that they are inseparable and the whole act must fall.

The superintendent of the western district of defendant and other operating officials testified that the average time of movement of freight cars on main lines in the United States generally is 2 hours and 24 minutes in each 24 hours; on defendant's road the average distance traveled by each freight car is slightly over 24 miles every 24 hours; which is slightly above the average of other roads throughout the United States; that traffic wholly within Nebraska might be moved at the statutory rate, but that to do so would retard interstate traffic to the extent that state business was advanced; that in practical operation interstate and intrastate traffic must move together; that freight of both characters is often loaded in the same car, and they can no more be separated than you can separate state and interstate passengers and operate separate passenger trains for them; that it is impracticable and perhaps impossible to move freight in Nebraska 50 miles a day of 24 hours. This testimony was largely matter of opinion, and upon cross-examination it was admitted that it is not impracticable to move cars from Louisville to Omaha in 24 hours.

Is the statute constitutional? It applies to "every railroad company operating a line of railroad wholly or in part within this state." In one section it requires "the conductor of every train bringing freight in car-load lots into this state from any other state to note on the original waybill of each and every car-load of such freight, destined to points within this state, the year, month, day of the month and hour of the day, on which such car-load of freight entered this state, and to authenticate the same by

his signature." It provides a time for the removal of freight in bond after permit to receive the freight is issued to the consignee by the United States collector of customs; and, considered as a whole, it evidences an intention to regulate all traffic. So far as the act attempts to regulate commerce between the states, it is of no force or effect, since congress has acted upon the subject, and when congress has acted the power of the state ceases. *Southern R. Co. v. Reid,* 222 U. S. 424; *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.,* 226 U. S. 426. The defendant insists that, since the act is invalid as respects interstate commerce, it is equally invalid as to commerce within the state. This is not a necessary conclusion. If the provisions of the act relating to interstate commerce can be disregarded and still leave a valid workable law, we see no reason why the act cannot be upheld so far as it applies to commerce within the state. It is true that some courts have held in somewhat similar circumstances that such a law will not permit a separation or division and the whole act must fall, but other courts take the view that, though a statute of this nature may be void and inoperative as a regulation of interstate commerce, it may be valid and enforceable with reference to transportation within the state. In *Commonwealth v. Gagne,* 153 Mass. 205, 10 L. R. A. 442, it is said: "A law which is unconstitutional within certain limitations, if in terms it exceeds or fails to notice those limitations, may yet be entirely operative within its legitimate sphere, and properly held to have the application which thus confines it. Indeed, where two governments, like those of the United States and the commonwealth, exercise their authority within the same territory and over the same citizens, the legislation of that which as to certain subjects is subordinate should be construed with reference to the powers and authority of the superior government, and not be deemed as invading them unless such construction is absolutely demanded. It should be held that such legislation was intended to apply, so far as it was within its sphere, and such construction should be given

it." Illustrative cases in point are *Oliver & Son v. Chicago, R. I. & P. R. Co.*, 89 Ark. 466; *Allen v. Texas & P. R. Co.*, 100 Tex. 525; *Southern R. Co. v. Melton*, 133 Ga. 277, 298; *Standard Oil Co. v. State*, 117 Tenn. 618, 641; *State v. Insurance Co.*, 71 Neb. 320; *McKee v. United States*, 164 U. S. 287; *Packet Co. v. Keokuk*, 95 U. S. 80; *People v. Butler Street Foundry & Iron Co.*, 201 Ill. 236, 249; *Attorney General v. Electric Storage Battery Co.*, 188 Mass. 239; *Murphy v. Wheatley*, 100 Md. 358; *State v. Western Union Telegraph Co.*, 75 Kan. 609, 629.

It is urged that the law places a burden on interstate commerce, and is therefore void because that which the legislature sought to regulate was the rate of movement of freight, and it is impossible to separate interstate and intrastate freight. There are several answers to this contention: First, the evidence is insufficient to show that the imposition of the duty upon the carrier of moving freight within the state a distance of 50 miles within 24 hours is unreasonable as applied to domestic freight, since the act allows a number of defenses to be made if traffic is obstructed or interfered with; second, the rate of movement of freight is not the only purpose of the act; third, the evidence does not establish that if freight within the state is moved at the rate required it will be necessary to unduly delay or hinder interstate transportation. The very fact that both classes of freight are sometimes carried in the same trains would tend to expedite and not to hinder shipments from without the state. Though the testimony is that the average movement of a freight car within the United States is only about 2½ miles a day and the average movement of freight cars upon the line of defendant is only about 24 miles for each 24 hour period, these computations are based upon the use of all freight cars, those standing upon side-tracks, in yards, in storage at division stations, being repaired, and in all other conditions, while the act applies only to freight cars which are in process of transportation, and the facts proved do not necessitate the conclusion urged. *Chicago, R. I. & P. R. Co. v.*

Beatty, 34 Okla. 321, 328, 42 L. R. A. n. s. 984, and on rehearing at page 988, in which many cases are cited on both points. We are satisfied that the statute does not operate as a hindrance or burden upon interstate commerce when confined in its operations to shipments from one point to another within the state.

The next assignment is that the court erred in granting a recovery for delay in switching cars which had been held awaiting orders from the consignees. It appears from the testimony that the plaintiff has three yards in different parts of the city; that the sand is usually billed to defendant at Omaha, but not to any particular yard or switch track. When the cars reach Omaha they are placed upon a "hold track" to await order, and reported by defendant to plaintiff's car clerk. As early as practicable after this is done, the clerk telephones the railroad company giving the disposition of each car. This is followed by a written order confirming the instructions. The time which it takes the plaintiff to direct defendant as to the setting of the car after notification that it has arrived in Omaha varies from a few minutes to a few hours, but almost without exception it is upon the same day, unless the car comes in at night. Section 6162, Rev. St. 1913, provides: "Cars for unloading shall be considered placed when they are held awaiting orders from consignors or consignees." Defendant's view of this statute is that as soon as the cars were placed upon the "hold track" to await orders, its liability for delay ceased. The district court took the view that the statute should be construed as if it read: "Provided all cars for unloading shall be considered placed *while* they are held waiting orders from consignors and consignees." The argument of plaintiff's counsel on this point is so apt and convincing that we copy from its brief: "If the duty of the railroad company would end with placing the cars on the 'hold track,' then there would be no delivery at all; and the statute would be meaningless. Cars might be placed on the 'hold tracks' for a day or a week or even a month, and the railroad company refuse to place them at

one of the plaintiff's yards, and the plaintiff would be remediless. The intent and purport of the statute was to give the plaintiff some remedy when the defendant neglected, delayed or refused to place the cars at their destination. If the railroad's construction of this statute is, as they contend, correct, then the whole statute fails in its purpose, for a train of sand is no more available to Sunderland Brothers on the 'hold tracks' of the defendant company than it would be at Louisville. The statute goes to the question of the prompt delivery of the cars at the point where the shipper wants them." We think the district court properly held that cars "held waiting orders" should be considered placed only while they were being so held, and that after orders were received from the consignee specifying the yard in which the cars should be placed the statutory time should again run. To hold otherwise would defeat the very object of the statute, to wit: the prompt delivery of cars after arrival at destination.

Plaintiff has filed a cross-appeal from the findings of the district court. In order to determine exactly the correctness of these findings, it would be necessary to examine the evidence as to the time of loading and of arrival in Omaha of each and every one of over 2,000 cars, and also to examine and determine how long a time each car was "held waiting orders" before delivery at the yards of the consignee. If the record and documentary evidence produced had been examined by disinterested and expert accountants and such experts had testified to the result of their examination, both the district court and this court would have been better able to determine the issues. The argument and briefs have not convinced us that the district court erred in its findings. The finding of the district court in such a case is of the same weight as the verdict of a jury and will not be set aside unless clearly wrong.

AFFIRMED.

ROSE, J., not sitting.

JOHN HENKE ET AL., APPELLANTS, V. GEORGE W. DEEMER, APPELLEE.

FILED APRIL 14, 1917. No. 19455.

1. **Justice of the Peace:** JURISDICTION. "In computing the 'amount in controversy' to ascertain whether a case is within the jurisdiction of a justice of the peace, interest accrued at the time of suit on an interest-bearing debt should be considered." *Adams v. Nebraska Savings & Exchange Bank*, 56 Neb. 121.
2. ———: ———. "It is not the amount which the bill of particulars shows the plaintiff might claim, but the actual amount of his demand, which ascertains the jurisdictional amount." *Adams v. Nebraska Savings & Exchange Bank*, 56 Neb. 121.
3. ———: ———. The bill of particulars and summons both disclosing that the amount of the debt with interest from the time it was claimed to the filing of the suit exceeded $200, a justice of the peace had no jurisdiction of the suit.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed, with directions.*

Allen G. Fisher and *William P. Rooney*, for appellants.

Lee Card, contra.

LETTON, J.

Plaintiff filed a bill of particulars, not verified, before the county judge exercising jurisdiction as a justice of the peace, and procured a summons, returnable in four days, to be issued and served. He sought to recover for medical services in the sum of $197, with interest from the 3d day of January, 1914. Defendants appeared especially and objected to the jurisdiction of the judge, because the amount sued for was in excess of $200, the limit of jurisdiction of a justice of the peace. The court had no power to issue a summons returnable in four days in such a case, and the summons was not returnable nor in form or substance such as required in term cases. This objection was overruled, and defendants made no further appearance. Judg-

ment was rendered by default against them for $197. Error proceedings were prosecuted to the district court, which affirmed the judgment. Defendants appeal.

In *Adams v. Nebraska Savings & Exchange Bank*, 56 Neb. 121, it is held that the "amount in controversy" which determines the jurisdiction includes interest accrued at the time of the suit, but that if the summons does not show on its face that the demand is in excess of jurisdiction upon default, the court could render judgment to the full jurisdictional amount.

In this case both the bill of particulars and the summons disclosed that the plaintiff claimed $197, with interest from January 3, 1914. The debt exceeded the jurisdiction of the county judge sitting as a justice of the peace, and the summons returnable in four days should have been quashed.

The judgment of the district court is reversed and the cause remanded, with instructions to reverse the judgment of the county court.

REVERSED.

CHAPIN E. MANNING, APPELLEE, V. LOUIS W. POMERENE, APPELLANT.

FILED APRIL 14, 1917. No. 20008.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: ACCIDENT. Plaintiff, who was employed to attend to and fire a steam-heating boiler, was compelled to use a narrow passageway when inspecting the steam gauges. Two iron beams lay on the boiler, and the ends projected over the passage. Plaintiff attempted to move them out of the way by pushing with his body, when he felt pain in his stomach, became faint and weak, was compelled to cease work and be assisted home. On the third day afterward he vomited blood, and afterwards had a slight paralytic stroke. *Held*, that his condition was the result of an accident as defined in section 3693, Rev. St. 1913, and that the injury arose out of and in the course of his employment.

2. ———: ———: APPEAL: CONFLICTING EVIDENCE. The evidence as to whether the present disability of the plaintiff was caused by the accident being conflicting, and there being sufficient testimony to that effect to support the finding of the district court, its judgment will not be disturbed.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Strode & Beghtol, for appellant.

Charles S. Roe and *G. P. Putnam, Jr., contra.*

LETTON, J.

Action under the workmen's compensation act. The plaintiff was a steam-fitter's helper employed by the defendant, who was engaged in the heating and plumbing business. While engaged in attending to a boiler for the defendant, the plaintiff attempted to move two steel "I" beams resting about three feet from the floor by pushing against the beams with his body. He did this once or twice, when he felt faint and sick, and was compelled to sit down. He was unable to work during the remainder of the day. He worked the next day at overseeing some other men. The next day was Sunday. He felt sick and faint during this time, but was able to take a walk that day. On Monday he felt worse, and that night he vomited blood, and has since been unable to work. He was paid compensation for part of the time, but afterwards defendant refused to make further payments, on the ground that the disability from which plaintiff now suffers is not due to the injury to which he ascribes it. The district court awarded him $678 as arrears, and $9.60 a week for 300 weeks, and $7.60 a week for the remainder of his life as compensation. From this award the defendant appeals, insisting (1) that the removal of the beams was not within the scope of plaintiff's employment; (2) that plaintiff did not suffer an "accident" as defined in the statute, and that his indisposition or disability was caused by senile arterio sclerosis; (3) that he has fully recovered from the effect of the injury, even if it had been caused by accident.

As to the first point we are satisfied that the injury or accident, if any there was, occurred in the course of plaintiff's employment. It seems there was a narrow passageway in which he was required to walk in order to reach the gauges showing the steam pressure in the boiler. The end of these beams projected over and obstructed the passageway, and, while there were steam-fitters near whom he might have called from their work to move the beams far enough to allow him to pass, it was perfectly natural and to be expected that in order to perform his duties he should move or attempt to move them himself. They were lying upon a projecting part of the boiler, and the testimony is that beams resting upon iron, as these were, usually slide easily when pushed. In our view he was acting within the scope of his employment.

As to the second point, defendant's argument is that under the definition of the word "accident" in section 3693 Rev. St. 1913, no accident happened. The statute provides: "The word 'accident' as used in this article shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury." It is insisted that no "unexpected or unforeseen event, happening suddenly and violently," occurred; that sickness arising from the placing of his body by plaintiff against the beams and surging back and forwards could not reasonably be said to be "an unforeseen event;" and that it did not happen suddenly and violently except as it was produced by the plaintiff himself. It is said that this language is "clearly meant to limit recoveries to accident such as the breaking of machinery, or the unexpected cutting or wounding of employee's person by some breaking or falling or exploding of apparatus, machinery, or tools." To hold this would unduly limit the meaning of this clause. The unforeseen event was the straining, weakening or lesion of the blood vessels of the brain or stomach, and this was an unforseen event happening suddenly. It

is also said that no "objective symptoms" of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce "at the time objective symptoms of an injury," but the difficulty is as to what constitutes objective symptoms. Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen, or ascertained by touch. We are of opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.

Plaintiff testifies that when he pushed against the beams he felt something give way in his stomach; that it made him sick and faint, and he was compelled to sit down. His son was working there as foreman, and, when told he was hurt, he came and stayed with him for some time, and assisted him to go home. He was sick, nauseated and weak, and had soreness and pain across his stomach, which kept increasing. The next morning he went to work but felt badly. He did not attempt to do anything except oversee a few men who were covering piping. He ate no dinner that day. His son again assisted him home. That night he was still sore and lame. Sunday he was still weak, and was unable to work on Monday. That night while in bed he was nauseated and vomited blood; afterwards he had hiccoughs that lasted for about two weeks, and was very weak, and soon afterwards had a slight paralytic stroke that affected one arm and leg. In addition to the testimony of plaintiff himself on this point, his son testifies that when he saw him just after the event he was sitting with his head bowed in his hands, and his face was pale and drawn. A workman testified that he saw plaintiff lift, and then go and sit down, bent over, holding his stomach. He said that he had hurt himself. "He kind of fainted away and came to." Another witness says he saw

him about 10 or 15 minutes after he lifted the beam; that he was sitting doubled over apparently in great pain. These facts seem to establish the occurrence of an accident for which the statute allows compensation. *LaVeck v. Parke, Davis & Co.*, 190 Mich. 604; *Madden's Case*, 222 Mass. 487; *Duprey's Case*, 219 Mass. 189; *Forrest v. Roper Furniture Co.*, 187 Ill. App. 504.

A very material question in the case is whether the disability from which the plaintiff is now suffering resulted from the accident. As to this the medical expert testimony is in conflict. Plaintiff was 63 years old at the time of the accident. He weighed about 195 pounds. His weight fell to 135 pounds soon afterward, and is now about 140 or 145. In the summer of 1915 he was examined by a number of physicians while in New York state. The substance of their testimony is that the condition in which the plaintiff was at that time was or might be the result of the injury he suffered in February of that year. His attending physician in Lincoln testified to the same effect. Two physicians testify for the defendant that the plaintiff's condition is evidently the result of a progressive arterio sclerosis, and could not have been the result of the injury. The physicians all agree that plaintiff is permanently disabled. In this state of the medical testimony there is sufficient to sustain the findings of the district court that the disability is the result of the accident.

JUDGMENT AFFIRMED.

CORNISH, J., not sitting.

WILLIAM FREW ET AL., APPELLEES, v. GEORGE SCOULAR, APPELLANT.

FILED APRIL 14, 1917. No. 18734.

1. **Principal and Surety: CONTRIBUTION: LIMITATIONS.** A surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation, and who has been compelled to

pay the debt of his principal, may exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid.

2. **Parol Evidence: SURETIES: CONTRIBUTION.** In an action by a surety for contribution from an alleged cosurety, parol evidence may be admitted to show the actual relation of the parties to the obligation discharged by plaintiff.

APPEAL from the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed.*

W. G. Hastings and *Buck, Brubaker & Buck,* for appellant.

Charles Battelle and *Cole & Brown, contra.*

ROSE, J.

This is an action for contribution between sureties. It is alleged in the petition that, April 17, 1894, George Scoular, William Frew, Thomas Donald and Janet Scoular, as sureties, and Robert and William Scoular, as principals, executed a bond for the payment of a loan of £1,500. The bond matured May 15, 1894, and was secured by a mortgage on land in Scotland, where all the parties resided except defendant, a resident of Nebraska. It is also alleged that the principals in the bond became insolvent, that the incumbered land was sold in satisfaction of prior liens, and that, in 1912, William Frew and the trustees of the estate of Thomas Donald, plaintiffs herein, were compelled to pay the debt. It is alleged further that the laws of Scotland do not bar an action on the bond before 40 years. The suit is brought against George Scoular to compel contribution in the sum of $2,999, his alleged liability as one of three solvent sureties. Defendant pleaded that he signed the bond in Nebraska, that he was then, and has since been, a resident thereof, and that the action is barred here by the statute of limitations—a five-year period. Rev. St. 1913, sec. 7567. Defendant also pleaded that he was not a surety, but that he signed the bond under an agreement to merely release any inheritable interest he might have in

the mortgaged land. The trial court directed a verdict for plaintiffs, and from a judgment in their favor for $3,018.12, defendant has appealed.

Should defendant's plea of the statute of limitations be sustained? The question may be stated thus: May a surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation, and who has been compelled to pay the debt of his principal, exact contribution from a cosurety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid? While the decisions appear to be in conflict, the better reason and the weight of authority seem to support the rule requiring contribution. *Camp v. Bostwick,* 20 Ohio St. 337; *Wood v. Leland,* 1 Met. (Mass.) 387; *May v. Vann,* 15 Fla. 553; *Crosby v. Wyatt,* 23 Me. 156; *Crosby v. Wyatt,* 10 N. H. 319; *Martin v. Frantz,* 127 Pa. St. 389; *Aldrich v. Aldrich,* 56 Vt. 324; *Wolmershausen v. Gullick,* 2 L. R. (1893) Ch. Div. (Eng.) 514.

In *Camp v. Bostwick,* 20 Ohio St. 337, it was contended, as in the present case, that, since the statute of limitations had barred an action by the creditor against the defendant before the plaintiff paid the debt, defendant received no benefit from such payment and was not liable for contribution. In answer to this argument the court said:

"If the right of a cosurety to claim contribution rested upon the doctrine of subrogation to the rights of the creditor, the proposition might be true. The doctrine of subrogation has its origin in the relation of principal and surety, whereby a surety who pays the debt of his principal is, in equity, substituted in the place of the creditor and is entitled to all the rights which the creditor may have against his principal. But the doctrine of contribution has its origin in the relation of cosureties or other joint promisors in the same degree of obligation. It is not founded upon the contract of suretyship. 1 Ohio St. 327, and 1 Cox, 318. It is an equity which springs up at the time the relation of cosureties is entered into, and ripens into a cause

of action when one surety pays more than his proportion of the debt. 4 Grat. (Va.) 268. From this relation the common law implies a promise to contribute in case of unequal payments by cosureties. But equity resorts to no such fiction. It equalizes burdens and recognizes and enforces the reasonable expectations of cosureties because it is just and right in good morals, and not because of any supposed promise between them. This equity, having once arisen between cosureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until he is released from all his liability in excess of his ratable share of the burden. Neither the creditor, the principal, the statute of limitations, nor the death of a party, can take it away."

Defendant argues that the Ohio case is based upon *Wood v. Leland,* 1 Met. (Mass.) 387, a suit in equity which must be distinguished, contribution now being a legal remedy to which the statute of limitations should be applied. The argument is not conclusive. The question is not whether the statute of limitations runs against a surety's claim for contribution, but when does the cause of action for contribution accrue? Ordinarily the statute of limitations does not commence to run until the cause of action accrues. The right of a surety to contribution does not arise until he has paid more than his proportion of the debt or until his liability has been determined by judgment. *May v. Vann,* 15 Fla. 553; *Wolmershausen v. Gullick,* 2 L. R. (1893) Ch. Div. (Eng.) 514; *Ex parte Snowdon,* 17 L. R. Ch. Div. (Eng.) 44. Upon this point most of the cases cited by defendant appear to be distinguishable. *Cochran v. Walker's Ex'rs,* 82 Ky. 220, and *Shelton v. Farmer,* 9 Bush (Ky.) 314, are decisions under local statutes modifying the general rule. *Lovell v. Nelson,* 11 Allen (Mass.) 101, and *Spelman v. Talbot,* 123 Mass. 489, rest upon special statutes relating to claims against the estates of deceased persons, but recognize the general rule announced in *Wood v. Leland,* 1 Met. (Mass.) 387. *Stockmeyer v.*

Oertling, 35 La. Ann. 467, without discussion, follows *Ledoux v. Durrive,* 10 La. Ann. 7, and neither case involves the statute of limitations. *Turner's Adm'r v. Thom,* 89 Va. 745, appears to be a case where payment by the plaintiff was voluntary; the statute of limitations having run in favor of both sureties. *Stone v. Hammell,* 83 Cal. 547, is a case where the plaintiff by absence from the state had suspended the operation of the statute. *McLin v. Harvey,* 8 Ga. App. 360, without any discussion of the principles underlying contribution, and *Screven v. Joyner,* 1 Hill Ch. (S. Car.) *252, announce the rule urged by defendant herein, but the reasoning is not convincing. The action for contribution was not barred by the statute of limitations.

The trial court excluded testimony tending to show that defendant signed the bond at the request of his brother, one of the principals therein, and that it was agreed between them and the obligee that defendant was merely releasing whatever inheritable interest he might have in the incumbered land, and that plaintiffs knew defendant was not to be held as a surety. This is not an action on the bond, but a suit between sureties to enforce contribution. Evidence was therefore admissible to show the actual relation of the parties to the bond. 4 Wigmore, Evidence, secs. 2444, 2445; *Chapman v. Garber,* 46 Neb. 16; *Cox v. Ellsworth,* 97 Neb. 392; *Oldham v. Broom,* 28 Ohio St. 41; *Chapeze v. Young,* 87 Ky. 476; *Leeper v. Paschal,* 70 Mo. App. 117; *Shea v. Vahey,* 215 Mass. 80; *Enterprise Brewing Co. v. Canning,* 210 Mass. 285; *Bulkeley v. House,* 62 Conn. 459, 21 L. R. A. 247. In the case last cited it was said:

"In considering the questions involved it should be borne in mind that this is an action for contribution. Contribution does not rest upon contract, but on the broad equitable principle that equality is equity. Justice and fair dealing demand that where one or more parties sign the same obligation, and become equally obligated in precisely the same degree thereby, and stand upon the same

footing as to their liabilities thereunder, one of the number shall not be compelled to assume the whole burden for his associates, but may compel them to share equally with him any loss that may occur as the result of their joint liability. In actions for contribution, therefore, the principle seems now to be well established that parol evidence is admissible to show the true relations existing between the several parties bound by a written obligation. * * * Such evidence is not offered to contradict or vary the contract contained in the writing, but simply to show the actual relations subsisting between the joint makers of the note and the real nature of the contract between them. Such facts are not a part of the contract and do not affect its terms, but are wholly collateral to it. To support his claim for contribution therefore, the plaintiff clearly had the right to show his true relation to the note, and this without regard to the knowledge of the defendant."

If defendant was not one of the sureties, he is not liable for contribution. The trial court therefore erred in excluding evidence on this issue. It follows that the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

CORNISH and DEAN, JJ., not sitting.

HAMER, J., concurring in part, and dissenting as to that part of the majority opinion which refuses to dismiss the case.

I concur in so much of the opinion as holds that the judgment of the district court shall not stand and reverses the same. But I would go further and dismiss the case. To the mind of the writer the majority opinion would import the Scotch statute of limitations into Nebraska and determine the liability of the defendant by that statute, and without consulting our own statute of limitations. It denies to the resident in Nebraska the protection which the Nebraska statute of limitations confers upon him. I would ask my brethren who are responsible for the majority opin-

ion if the statute of limitations of this state does not run in favor of a man who was a resident of Nebraska at the time he signed the contract and has never since changed that residence?

It is said in *Bell v. Morrison,* 1 Pet. (U. S.) *351, opinion by Justice Story: "It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light, as an unjust and discreditable defense, it had received such support as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those perjuries which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them."

The majority opinion concedes that "the decisions appear to be in conflict," but then says that the better reason is that there shall be a rule allowing contribution. This decision in effect imports, in a way, the Scotch statute of limitations to Nebraska.

It should be remembered that this is not an action on the instrument which the defendant signed. This is an action to enforce contribution. It is based on the claim of the plaintiffs that the defendant was liable with them as a cosurety, and that they paid the debt, and therefore, that he should pay them his share. Before the defendant can be liable he should stand upon the same footing and be under the same burden with the other sureties when they paid the debt. The right to enforce contribution is based upon the fact that one or more of several, having a common liability, has paid the debt. If the basic fact upon which the right

rests, the common liability, is lacking, payment by the cosurety gives no right to contribution.

The majority opinion does not answer the questions: (1) Does the Nebraska statute run in Nebraska? (2) If it does run, could the holders of the instrument showing the indebtedness sue the defendant in Nebraska upon it after the expiration of five years from the time it came due, and maintain an action upon it? (3) If they could not, then was the defendant liable upon the said bond and mortgage at the time the plaintiffs paid and satisfied it, between 17 and 18 years after it became due? (4) And if the defendant was not liable upon it, what sort of favor did the plaintiffs confer upon the defendant when they paid it? (5) And if the Scotch statute of limitations is 40 years, and the plaintiffs were still liable under it for the debt up to the time they paid it, and the defendant, who lived in Nebraska, and not in Scotland, had been released from the payment of it by the Nebraska statute of limitations, five years, can you explain how the sureties in Scotland and the alleged surety in Nebraska actually stood upon the same footing and carried the same burden when the Scotch sureties paid the debt in Scotland, and, if you cannot explain it, why should the rule that there can be no contributon enforced between sureties unless at the time of payment the sureties who pay and the surety against whom contribution is sought stand upon the same footing and carry the same burden be disregarded in this case?

I have looked and listened in vain for answers to these questions.

When the Scotch sureties paid the original debt due on the mortgage the defendant had already been released from the payment of that debt if the statute of limitations runs in Nebraska. But the Scotch sureties were still liable on the original mortgage when they paid the debt, because they were living in Scotland under a statute of limitations by which the debt would be continued 40 years. But at this time the defendant was not liable, if he had ever been liable, because the Nebraska statute of limitations had re-

leased him from the payment of that original debt. If the defendant had been released from the payment of the original debt by the statute of limitations of the state of Nebraska, then he did not stand on the same footing as the Scotch sureties in Scotland, and there could be no way to make the defendant liable unless he made a new promise, and this he is not shown to have done.

We have only to inquire whether Clark, the creditor in Scotland, or the trustee in charge of his estate, could come to Nebraska and maintain an action against the defendant on the instrument which it is alleged he signed. Of course, no such action might be maintained in Nebraska, because the Nebraska statute of limitations rendered the maintenance of such an action impossible, but it is claimed that the cosureties paid the debt, and therefore that they acquired the right to compel the defendant to pay what they allege was his proportion. And now as the Nebraska statute of limitations does run in Nebraska, and the defendant had been released from the payment of the original debt by such statute, he must have been already discharged. Of course, if the sureties in Scotland had chosen to pay the debt before the statute of limitations in Nebraska outlawed it, they might have done so, and then they could have come to Nebraska and could have successfully sued the defendant for contribution and maintained their suit against him. But they did not come, and when the Nebraska statute released him it became impossible that they should acquire any right unless he made a new promise, and that he did not do.

It is contended by the plaintiffs that the statute of limitations in Nebraska did not run for the reason that the sureties in Scotland made payments on the debt. But it is proper to remember that the theory upon which a payment prevents the statute of limitations from running is that the payment is a new promise by the debtor. In this case there was no new promise for the reason that the surety in Nebraska, if he was a surety, knew nothing about these payments being made and, therefore they could not be his

promise. To illustrate: Suppose that A sues B for contribution as a cosurety with him on the bond of A, B, and C to D, which bond A has paid, and suppose B's execution of the bond was obtained by duress, a good defense to an action by D in whose favor the bond was given, and equally and surely a good defense in an action for contribution by A; for if B had no liability on the bond, being compelled to execute it by duress, his defense to an action for contribution could not be defeated by A's act in paying the debt. So, likewise, if B's liability is terminated by the statute of limitations, A cannot by payment of C's obligation, on which A and B are sureties, compel contribution from B. B's obligation is terminated. A remedy against him cannot be revived otherwise than by his own act.

Did the statute of limitations run in Nebraska? In Pingrey, Suretyship and Guaranty (2d ed.) sec. 90, it is said: "The American doctrine is that a part payment by one of several joint debtors is inoperative to prevent the running of the statute of limitations as to the others. In order to prevent the running of the statute, payment must be made by the debtor in person, or for him by authority, or for him and in his name without authority, but subsequently ratified by him. The mere fact that he has knowledge of payment being made by his codebtor is not sufficient. Hence, a partial payment of a promissory note or debt by the principal debtor will not suspend the statute of limitations as to the surety." Of course, the same thing must be true as to a surety where the payment is by one or more of his cosureties.

In *Cocke v. Hoffman*, 5 Lea (Tenn.) 105, 40 Am. Rep. 23, it was held: "A surety who pays the debt after the bar of the statute of limitations has attached in his favor, is not entitled to recover contribution from a cosurety equally protected by the statute." That was an action for contribution. Jesse M. Lyons, the intestate of the plaintiff in error, commenced said action January 20, 1867, against James Hoffman, before a justice of the peace, to recover contribution from him as a cosurety for money paid in discharge

of the common debt. Lyons and Hoffman were sureties for James Richards on a note dated December 14, 1862, and payable one day after date to William Lyons, for $100. Jesse M. Lyons paid this note on the 20th of January, 1875, after the bar of the statute of limitations had become fixed. In the body of the opinion it was said that "it has never been held that if one of such parties (a cosurety) pays the debt after it has ceased to be legal, subsisting and compulsory, as where he is himself protected by the statute of limitations, or by a discharge in bankruptcy, he could recover against a cosurety."

In *Cochran v. Walker's Ex'rs,* 82 Ky. 220, it was held: "A surety who has paid a judgment cannot enforce contribution against his cosurety, if, when the debt was paid, the statute of limitations ran as between the original obligee and the cosurety or his executor." In the body of the opinion it is said: "It is conceded that, if one surety pays the debt to his principal after the running of the statute, he has no right of contribution against his cosurety, so as to defeat the plea of limitation."

In note c, 98 Am. St. Rep. 44 (*Stockwell v. Mutual Life Ins. Co.,* 140 Cal. 198), it is said: "The general rule is that where one joint debtor pays a debt which is barred by limitation, without the consent of his codebtor, he is not entitled to contribution from him"—citing many authorities.

In *Spelman v. Talbot,* 123 Mass. 489, it is said in the statement of the case: "The prayer of the bill was for judgment for the amount of the defendants' intestate's contributory share in the sums paid by the plaintiffs, and for general relief. The answer contained a demurrer for want of equity." The court held that there could be no recovery, "inasmuch as it (the claim in the case) did not come into existence until after the period had arrived at which the administrators of the deceased were relieved by law of all liability." While this is not the usual case for contribution, the nature of it is the same.

In *Turner's Adm'r v. Thom,* 89 Va. 745, it is held: "To entitle one joint obligor to recover from his co-obligor mon-

ey paid by him in excess of his proportion, the payment must have been made upon a debt for which the latter was legally liable at time of the payment, and which the obligor paying was compellable to pay, and not upon a debt that was barred as to the obligor sought to be charged."

It was a suit for contribution. The court said in the body of the opinion: "For, whether the doctrine of contribution 'is the result of a general equity which equalizes burdens and benefits,' or originates in a contract which the law implies, that the joint promisors, at the time of the giving of the joint obligation, mutually promise each other that, if one is compelled to pay more than his proportion of the joint debt, the other will indemnify the one so paying to the extent of the excess over his just proportion, it is equally clear that the payment must have been made upon a debt for which the defendant was legally liable at the time of the payment, and which the obligor who pays was compellable to pay, and not upon a debt which was barred as to the obligor sought to be charged"—citing Wood, Limitations, 321, 322; *Bell v. Morrison,* 1 Pet. (U. S.) *351; 1 Story, Equity Jurisprudence (13th ed.) sec. 325, and note; *Fordham v. Wallis,* 10 Hare (Eng.) *217.

In *Stockmeyer v. Oertling,* 35 La. Ann. 467, it was held: "The party from whom contribution is demanded must have been under a legal obligation to pay at the time payment was made by him who demands the contribution." In the body of the opinion it was said: "The party from whom contribution is demanded must have been himself under a legal obligation to pay at the time payment was made by him who demands the contribution."

In *McLin v. Harvey,* 8 Ga. App. 360, it was held: "As a general rule, one surety cannot recover contribution from another when the debt paid by the surety seeking contribution was not binding either on the principal or on the other surety. * * * The right of contribution does not rest on the original contract, but arises out of the relation, created thereby, of a common obligation, and the contract implied therefrom of discharging the common obligation equally,

and when one surety or indorser on a promissory note is, by operation of law, discharged from the obligation of payment, the obligation thus discharged cannot, without his consent, be revived against him by the voluntary act of a cosurety."

In *Ellicott v. Nichols,* 7 Gill. (Md.) 85, it was held: "A plaintiff who seeks to extricate a case from the act of limitations must show a new promise, within three years prior to the institution of the suit, either express or implied." It was also said: "One copromisor who pays a debt barred by the act, against the consent of his co-debtor, cannot maintain an action for contribution against such co-debtor."

In *Wheatfield Township v. Brush Valley Township,* 25 Pa. St. 112, it is held: "Where a debt is due from several parties, and one of them pays it after it is barred by the statute of limitations, he cannot maintain an action for contribution against the other debtors." In the body of the opinion it is said: "The action for contribution is founded upon the equity arising from the payment by the plaintiff of more than his share of a liability existing at the time against both. Where the plaintiff is not liable for the debt, he has no right to volunteer a payment for the purpose of making the defendant his debtor. And where the defendant is not bound for it, the payment confers no benefit upon him."

In *Williamson's Adm'r v. Administrator of Rees,* 15 Ohio, 572, it is held: "The cosigners of a note, joint and several in its terms, which fell due in 1807, and on which a suit was severally instituted in 1814 against another co-obligor, and judgment recovered, and afterwards suffered to lie dormant 16 years, and then revived, and finally paid, 38 years after it became payable, cannot be compelled to contribute."

In *Hunter v. Robertson & Robertson,* 30 Ga. 479, it was held: "A payment by the principal or maker of a promissory note, before barred by the statute, does not constitute a new point for the running of the statute of limitations as

against the indorser or surety, unless such indorser or surety be a party to such payment."

In *McBride, Adm'r, v. Hunter,* 64 Ga. 655, it was held: "A payment and entry thereof on a note by the principal does not prevent the bar of the statute of limitations from attaching in favor of his security. Nor can the administrator of one who signed a note only as security relieve it from the bar of the statute so far as primary creditors may be affected thereby. Especially is this the case where the note was barred before the death of the security."

In *Rogers v. Burr,* 105 Ga. 432, 447, the decision of Lord Mansfield in *Whitcomb v. Whiting,* 2 Doug. (Eng.) 652 (the beginning of the trouble) is cited, and the court say: " 'The foundation on which it rests was found to be altogether unsatisfactory. In Pennsylvania and some of the other states it has been utterly exploded'—citing *Levy v. Cadet,* 7 Serg. & Rawle (Pa.) 126; 4 Greenleaf, 140; also cases collected in 2 Pick. (Mass.) 581, 583, note 1."

In *Ledoux v. Durrive,* 10 La. Ann. 7, it was held that when one of several sureties has paid the debt he cannot, in an action for contribution against his cosurety, recover when "at the time of such payment the cosurety himself was under no legal obligation to pay."

This court long ago settled that payment by one surety is no bar to the running of the statute of limitations as to another. I would say that the great weight of authority is so strong that it would seem there should be no serious contention about the matter, but for the fact of the existence of this majority opinion. As early as 1877 this court in *Mayberry v. Willoughby,* 5 Neb. 368, held: "To take a debt out of the statute, there must be an unqualified acknowledgment of the debt as originally due, and a promise to pay it; and if the promise is conditional, the condition must be performed before an action can be maintained on the promise." It was also said: "A promise by one joint debtor will not take a debt out of the statute of limitations as to his cocontractors, unless he is specially and severally authorized by them for that purpose." The moral right of

the statute and the wisdom of its policy were commented upon by Justice Gantt, who said: "Hence, the law must be regarded as designed to protect persons from ancient claims, whether well or ill founded; and its tendency is to produce speedy settlements, and if such settlements are not made within the time limited by the law, its effects are such as to extinguish the legal liability upon the debt, unless it be revived by a new promise; and therefore if the creditor by his own fault and laches permits the statute to attach, whatever may be the nature or character of his claim, he cannot complain of the operation of the law, since it is by his own negligence that it can be brought to bear against him."

There was nothing to prevent the sureties in Scotland from paying the debt there within five years after it fell due, and then they could have come to Nebraska and could have sued the defendant here within that time. By so doing they could have recovered a judgment for contribution money from the defendant to the extent of his share of the debt. But they wait 17 years until the principals have failed and until they have gone through bankruptcy. They wait until the property mortgaged in Scotland, in which this defendant had an interest, has been sold, probably for very much less than its value. They seem to have had possession of this property, and after the defendant has nothing left in Scotland of his inheritance they try to get judgment against him in Nebraska and to absorb the results of his 25 years of labor here.

It is contended that the Scotch sureties by the payment of the debt of Scotland kept alive some sort of living principle in it.

In *Dwire v. Gentry*, 95 Neb. 150, it is said: "The payment of interest on a note by a principal without the authority, knowledge or consent of the surety will not stop the running of the statute of limitations as to the surety." In the body of the opinion it is held: "That the statute of limitations is one of repose, and that when the time limited by it has expired then in legal contemplation the debt is

extinguished, and can only be revived by a new promise by the person sought to be charged or by some person lawfully authorized by him for that purpose." If we apply the principle stated in that case to the instant case it is apparent that the debt in Scotland had been outlawed in Nebraska, and that no suit could be maintained upon it here. It follows, therefore, that the Nebraska surety did not stand upon the same footing and did not bear the same burden borne by the Scotch sureties under their very long winded statute of limitations.

In *Dwire v. Gentry, supra,* the case of *Omaha Savings Bank v. Simmeral,* 61 Neb. 741, was relied upon. Mr. Justice Letton, referring to the last-named case, quotes from it: "No payments were made on the note by Redick. Simmeral, the principal on the note, made several payments, which were without the knowledge or consent of Redick, the surety. The payments so made did not toll the statute as to Redick."

In *Mizer v. Emigh,* 63 Neb. 245, it is said: "A payment made on an account by a person other than the debtor, without his authority, knowledge and consent, will not toll the running of the statute of limitations." In that case the statute of limitations was interposed as a defense and was sustained by the court below, which rendered a judgment for the defendant. This court affirmed the judgment.

Along the same line as the cases above cited and quoted from are *Bell v. Morrison,* 1 Pet. (U. S.) *351; *Coleman v. Fobes,* 22 Pa. St. 156; *Screven v. Joyner,* 1 Hill Ch. (S. Car.) *252; *Willoughby v. Irish,* 35 Minn. 63; *Waughop v. Bartlett,* 165 Ill. 124; *Bulkeley v. House,* 62 Conn. 459; *Oldham v. Broom,* 28 Ohio St. 41; *Smith v. Coon,* 22 La. Ann. 445; *Pfenninger v. Kokesch,* 68 Minn. 81; *Harper v. Fairley,* 53 N. Y. 442; *Hance v. Hair,* 25 Ohio St. 349; *Mozingo v. Ross,* 150 Ind. 688; *Bottles v. Miller,* 112 Ind. 584; *Littlefield v. Littlefield,* 91 N. Y. 203; *Kallenbach v. Dickinson,* 100 Ill. 427; *Myatts & Moore v. Bell,* 41 Ala. 222; *Steele v. Souder,* 20 Kan. 39; *Tate v. Clements,* 16 Fla. 339; *Van Keuren v. Parmelee,* 2 N. Y. 528; Angell,

Limitations (6th ed.) sec. 259; 2 Wood, Limitations (4th ed.) sec. 285. In that section it is said that the doctrine of *Whitcomb v. Whiting,* 2 Doug. (Eng.) 652, is repudiated; that "the courts, without any express legislation, have repudiated the doctrine as unsound, predicated upon erroneous reasoning, and opposed to the spirit of these statutes. Especially is this the case in New Hampshire, Pennsylvania, Tennessee, Kansas, Florida, Maryland, Illinois, and by the United States supreme court;" also, that the doctrine in *Whitcomb v. Whiting* "has been nearly obliterated by legislative and judicial action."

I think that I have examined all the cases cited in the majority opinion. Some appear to be overruled. Only one seems to justify the views expressed in the majority opinion. It is *Aldrich v. Aldrich,* 56 Vt. 324, where the plaintiff and defendant were cosureties on a promissory note, and the principal and sureties were residents of Vermont, and after the statute of limitations became a bar in Vermont the plaintiff went to New Hampshire where the statute of limitations is no defense, and was there sued and judgment rendered against him when he paid the debt. It was held that he had an action for contribution against his cosurety. In *Waughop v. Bartlett,* 165 Ill. 124, 133, it is said: "One joint maker of a note cannot, by payment thereon or any other act, stop the running of the statute of limitations against another joint maker, except when duly authorized for that purpose." In the body of the opinion it is said: "The note in this case shows indorsements of interest thereon, at regular semiannual periods, from its date up to January 1, 1890. These indorsements of interest were all made by the holder of the note or his representative in the state of Massachusetts. Of themselves they would not constitute a new promise."

Justice Story in delivering the opinion of the court in *Bell v. Morrison,* 1 Pet. (U. S.) *351, *367, quoted Lord Mansfield's opinion in *Whitcomb v. Whiting,* 2 Doug. (Eng.) 652, where he said: "Payment by one is payment for all, the one acting virtually as agent for the rest;

and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due." Justice Story said of this very brief exposition of a legal principle: "This is the whole reasoning reported in the case, and is certainly not very satisfactory. It assumes that one party, who has authority to discharge has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now, this very often constitutes the matter in controversy. It is true that a payment by one does inure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt. If such payment were made, after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor would no longer sue them. In truth, he who pays a joint debt pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them. When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and therefore there is no ground on which to raise a virtual agency to pay that which is not admitted to exist."

Eighteen of the courts of last resort in the United States, which I have examined, together with the United States supreme court, have declared for the doctrine which I have endeavored to express in this dissent. If I am right, there is against them only the highest tribunal of the state of Vermont. The majority opinion seems to disregard the decisions of the supreme court of our own state.

In note 17, sec. 287, 2 Woods, Limitations (4th ed.) it is said: "The earlier decisions in New York following *Whitcomb v. Whiting* (see *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Patterson v. Choate*, 7 Wend. (N. Y.) 441) were

overruled in 1849, in *Van Keuren v. Parmelee,* 2 N. Y. 523, 51 Am. Dec. 322."

In the body of the text (section 285) it is said: "The doctrine of *Whitcomb v. Whiting,* 2 Doug. (Eng.) 652 that an acknowledgment, new promise, or payment, made by one of two or more joint contractors, will remove the statute bar as to all, has practically but little force at the present day, as in many of the states the legislature has expressly overridden it by providing that no acknowledgment, promise, or part payment made by one joint debtor shall deprive the others of the benefit of the statute; * * * especially is this the case in New Hampshire, Pennsylvania, Tennessee, Kansas, Florida, Maryland, Illinois and by the United States supreme court; while in Connecticut, New Jersey, Rhode Island, and Delaware, the doctrine of *Whitcomb v. Whiting* is still adhered to." Many authorities are cited against the doctrine. It is also said in the text that the doctrine of *Whitcomb v. Whiting* "has been nearly obliterated by legislative and judicial action." In addition to the authorities above cited, which are against the doctrine of *Whitcomb v. Whiting,* are the following states mentioned in note 3, under section 285: Alabama, Iowa, Minnesota, Kansas, South Carolina, Ohio, California, Oregon, Nevada, Nebraska, Texas, Arizona, Dakota, Idaho, Montana, Utah, and Wyoming.

If I have correctly counted the decisions as they are cited, the courts of last resort in 22 states have repudiated the doctrine of *Whitcomb v. Whiting* as it was laid down by Lord Mansfield.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. VILLAGE OF EDDYVILLE ET AL. APPELLEES.

FILED APRIL 14, 1917. No. 19298.

Waters: DIVERSION: INJUNCTION. An injunction at the suit of a railroad company to prevent a village from diverting waters along

a highway boundary to plaintiff's railroad embankment between the village and a river constituting the natural drainage basin *held* properly denied, where plaintiff disregarded a statutory duty to construct a culvert at the highway crossing and failed to prove that injury from such diversion would nevertheless have occurred.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Edson Rich, B. W. Scandrett, E. F. Dougherty and *I. J. Nisley,* for appellant.

Niles E. Olsen, contra.

ROSE, J.

This is a suit for an injunction to prevent the village of Eddyville, defendant, from diverting water from the natural course of drainage to the roadbed of the Union Pacific Railroad Company, plaintiff. From a judgment of dismissal, plaintiff has appealed.

Running northwest and southeast parallel with the general direction of Wood river, the railroad, with a grade two feet or more above the surface of the ground, is located between that stream and the western boundary of Eddyville. The general slope of the land around the village is west or southwest toward Wood river, which is the natural drainage basin. On this part of the watershed there are only two openings in the railroad embankment, each being a 24-inch tile culvert. The northern boundary of Eddyville is a Dawson county road running east and west across the railroad and Wood river a short distance west of the village. In draining an 80-acre lagoon with its center in the county highway east of Eddyville, Dawson county constructed an 8-inch tile drain, 1,200 feet long on the north side of the public road, the east or lower end of the drain being north of the village, near the mouth of a drainage basin heading in hills to the north. Later, in 1911, the village enlarged a ditch or natural depression extending from the west end of the tile along the north side of the county road to the railroad right of way. At times water followed this drain to the railroad embankment, flowed north 600

feet, and passed through a 24-inch tile culvert under the railroad track. In June, 1914, there was an unusual flood which washed out the culvert and 15 feet of railroad track.

The position taken by plaintiff is that defendant, by means of its ditch, wrongfully contributed to the diversion of water from the natural course of drainage to plaintiff's right of way, thus causing irreparable injury. Stated differently, plaintiff insists that water which, in the natural course of drainage, would have run southward through the village was diverted westward along the highway to the railroad. The trial court refused to grant an injunction. The decision is without error for the following reasons: The drainage of the highway is authorized by statute. Rev. St. 1913, sec. 2944; *McLaughlin v. Sandusky,* 17 Neb. 110. The 8-inch tile drain was constructed by the county, and the latter does not complain of any act of defendant. There was a natural depression or ditch where the drain was widened and deepened by defendant. Both before and after defendant improved the ditch part of the water followed it to plaintiff's right of way and part flowed through the village. The construction of a drain along a highway is not an improper use thereof. *Wachter v. Lange,* 94 Neb. 290; *Churchill v. Beethe,* 48 Neb. 87. Such a drain is not necessarily limited to waters on the highway, but may inure to the benefit of an adjoining proprietor. *Thom v. Dodge County,* 64 Neb. 845. A properly constructed culvert through the railroad embankment at the highway crossing would have drained water from the village ditch along the highway to Wood river. It is the statutory duty of a railroad company to make such a culvert when necessary. Rev. St. 1913, sec. 3016. The necessity therefor may fairly be inferred from the proofs. That duty has not been performed. There is a failure to prove that the injury of which plaintiff complains would nevertheless have occurred. In addition, the capacity of the culvert 600 feet north of the crossing is inadequate when the quantity of water which naturally collected there is taken into con-

sideration. These are circumstances under which a court of equity may refuse an injunction.

AFFIRMED.

SEDGWICK, J., not sitting.

WESTERN LIFE & ACCIDENT COMPANY OF COLORADO, APPELLANT, V. STATE INSURANCE BOARD, APPELLEE.

FILED APRIL 14, 1917. No. 19380.

1. **Insurance: "ASSESSMENT ASSOCIATION."** An insurance company which requires the payment of a fixed premium in advance and provides benefits not in any degree dependent upon the collection of assessments from other members, and which does not provide for the levying of extra assessments, if necessary, is not an assessment association as defined by the Nebraska insurance laws. Rev. St. 1913, sec. 3138.
2. ———: **RESERVE FUND.** A mutual insurance company which guarantees dividends in the form of paid-up insurance for one year to policy-holders who have been members continuously for five years may be required by the insurance board to provide a reserve fund to meet the liability thus created. Rev. St. 1913, secs. 3138, 3139, 3233, 3235.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

R. C. Roper and *Leo E. Pryor,* for appellant.

Willis E. Reed, Attorney General, and *George W. Ayres, contra.*

ROSE, J.

The Western Life & Accident Company of Colorado, a corporation engaged in the business of accident and sickness insurance, applied to the insurance board for a certificate of authority to transact business in Nebraska. Its policy contains the following provision: "Each fifth year period continuous membership from the date of this contract shall entitle the insured to a dividend to be applied

on the premiums of this policy, but said dividend shall not be less than twenty per cent. of the premiums paid hereon during said five-year period."

An insured entitled to the benefit of this provision is described in the record as a "persistent policy-holder," and is entitled to paid-up insurance for the sixth year. The insurance board declined to issue a certificate on the ground that plaintiff refused to make any provision for the establishment of a reserve fund to meet the claims of persistent policy-holders, thus disregarding a regulation of the insurance board. Plaintiff appealed to the district court, where the decision of the insurance board was affirmed. From the affirmance, plaintiff has appealed to this court.

Has the state insurance board power to require plaintiff, a mutual insurance company of Colorado, to provide a reserve fund for deferred dividends guaranteed to persistent policy-holders in the form of paid-up insurance for the sixth year of continuous membership, as a condition of procuring a certificate to transact business in Nebraska? Plaintiff contends that only 7 per cent. of its members become persistent policy-holders, that it is an assessment company, and that it is without power to create a reserve fund for the protection of a part of its policy-holders. Plaintiff purports to be organized under Colorado laws providing for the incorporation of insurance companies "upon the assessment plan." The Nebraska statute defines an "assessment association" to be "one that meets its losses and expenses from assessments levied upon its members," and a "mutual company" to be "one without capital stock that charges a fixed premium and is required to maintain the same reserve as a stock company." Rev. St. 1913, sec. 3138. The contract of insurance issued by plaintiff provides for the payment of a membership fee and a fixed premium in advance, the insurance being for a term of one month, renewable upon the payment of the premium in advance for the succeeding month. The policy also provides that the liability of the insured "shall not exceed twelve monthly premiums in one year and shall not be less than

eleven." It does not appear that the indemnity to be paid to the insured is dependent upon the collection of assessments from other policy-holders, nor that additional assessments may be levied, if necessary. Within the meaning of the insurance laws plaintiff does not transact business on the assessment plan and is not an assessment association. Rev. St. 1913, secs. 3138, 3262-3264, 3268; *State v. Matthews,* 58 Ohio St. 1; *Knott v. Security Mutual Life Ins. Co.,* 161 Mo. App. 579. The insurance board may properly hold that plaintiff, not being an assessment association, is not entitled to a certificate to transact business without complying with the conditions imposed upon similar mutual companies.

Mutual companies are required to maintain the same reserve as stock companies. Rev. St. 1913, sec. 3138. The insurance board requires domestic companies, guaranteeing deferred dividends in the form of paid-up insurance to persistent policy-holders, to provide a reserve fund, and applied the same rule to plaintiff. This regulation appears to be authorized by law. Rev. St. 1913, secs. 3139, 3235, 3275.

The statute provides that the insurance board "shall have general supervision, control and regulation of insurance companies, associations, and societies, and the business of insurance in Nebraska;" that "it shall have power to make all needful rules and regulations for the purpose of carrying out the true spirit and meaning of this chapter and all laws relating to the business of insurance;" and that "no insurance policy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the insurance board and approved by it." These powers may be exercised to compel a foreign insurer to provide a reserve fund required of a similar domestic insurer.

The judgment of the district court is therefore

AFFIRMED.

KILPATRICK BROTHERS COMPANY, APPELLANT, V. FRENCHMAN VALLEY IRRIGATION DISTRICT, APPELLEE.

FILED APRIL 14, 1917. No. 19397.

Waters: IRRIGATION: ADVERSE USER. During the time a prior appropriator carrying water for hire to landowners is properly engaged in developing its right, the use of water by an upper proprietor under a subsequent appropriation is not adverse, where it does not deprive the prior appropriator of the use of water when actually needed.

APPEAL from the district court for Chase county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Charles W. Meeker and *Hazlett & Jack,* for appellant.

C. E. Eldred and *John F. Cordeal, contra.*

ROSE, J.

Plaintiff brought this suit in equity in the district court for Chase county to determine priority of rights to the use of waters of the Frenchman river for irrigation. According to an adjudication by the state board of irrigation, defendant's predecessor, the Culbertson Irrigating & Water Power Company acquired, May 16, 1890, an appropriation of 215 cubic feet of water a second. Plaintiff is an upper proprietor, and its adjudicated appropriation, 64.86 cubic feet of water a second, dates from December 23, 1890. These appropriations as thus originally established are not in dispute, but it is asserted that, by prescription or adverse user for the statutory period of ten years, defendant lost and plaintiff acquired all of the prior appropriation in excess of 50 cubic feet of water a second. On the contrary, it is insisted that plaintiff's use of water to which defendant was entitled under its adjudication was not adverse and that the proofs are insufficient to entitle plaintiff to relief in equity. The trial court found the issue in favor of defendant and dismissed the suit. Plaintiff has appealed.

On appeal a careful examination of the evidence leads to the conclusion reached by the trial court. The elements essential to prescription or adverse user for the statutory period of ten years are not established by the proofs. In many respects defendant's irrigating enterprise was a growth in a new country. Its irrigating system was established principally for the purpose of carrying water for hire to the lands of others. The benefits of irrigation were not fully understood by all owners of lands along defendant's canals. It required time to procure irrigating contracts for all available water. The right to the appropriation continued as a developing right. *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121. Under such circumstances plaintiff's diversion of water which could not be beneficially used by defendant was not adverse. When the conditions and circumstances outlined are considered, the proofs do not show that plaintiff's use was adverse as distinguished from permissive. *Maranville Ditch Co. v. Kilpatrick Bros. Co.*, 100 Neb. 371; *Ison v. Sturgill*, 57 Or. 109. Relief on the ground of adverse user was therefore properly denied.

AFFIRMED.

CORNISH, J., not sitting.

GEORGE HOLMES, ADMINISTRATOR, APPELLEE, v. CHARLES F. DOLL, APPELLANT.

FILED APRIL 14, 1917. No. 19401.

1. **Appeal: MISTAKEN REMEDY: AFFIRMANCE.** In an action against a trustee for the value of notes and mortgages which he has wrongfully refused to transfer to the administrator of the estate of the beneficiary, where the petition shows that plaintiff is entitled to relief in some form, a judgment in his favor on a verdict sustained by evidence which in a court of equity would require findings in his favor will not be reversed on appeal merely because he mistook his remedy and prayed for a money judgment.

2. **Limitation of Actions:** SUIT AGAINST TRUSTEE. The statute of limitations does not commence to run against an action by the administrator of the estate of a beneficiary, to recover from the trustee the value of notes and mortgages which he has refused to transfer to plaintiff, until the trustee has repudiated his trust and refused to transfer the property.

3. **Appeal:** AMENDMENT OF ANSWER: DISCRETION OF COURT. The refusal of the trial court to permit defendant to file an amended answer adding a counterclaim or set-off will not be disturbed unless an abuse of discretion has been shown.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

G. W. Shields & Sons, for appellant.

Howard H. Baldridge and *Piatti & Wear, contra.*

ROSE, J.

This is an action by the administrator of the estate of August Doll, deceased, to recover from Charles F. Doll the value of seven notes and mortgages held by the latter in his own name in trust for his uncle, the decedent, and which defendant has refused to transfer to plaintiff. Defendant admitted his refusal to transfer to plaintiff the notes and mortgages, asserted ownership thereof, and pleaded the statute of limitations as a bar to the action. The jury returned a verdict in favor of plaintiff for $28,770.30, the value of the notes and mortgages with interest. From a judgment thereon, defendant has appealed.

Defendant contends that plaintiff's remedy is a suit in equity, and that an objection to the introduction of evidence on that ground should have been sustained. In this connection it is also argued that the trial court erred in refusing to strike out that part of the reply tending to state an equitable action, on the ground that allegations of that nature should have been inserted in the petition. Of this ruling defendant is not in position to complain. Upon his motion similar allegations had previously been stricken from the petition. The petition and reply state facts en-

titling plaintiff to relief in some form. That the prayer of the petition is for a money judgment only does not prevent plaintiff from obtaining relief. *Seely v. Seely,* 150 N. Y. Supp. 66; *Schulsinger v. Blau,* 82 N. Y. Supp. 686; *Murtha v. Curley,* 90 N. Y. 372. The proof supports the finding of the jury. The parties understood the nature of the controversy between them. The identity of the notes and mortgages described in the petition and the character of plaintiff's claim were not left in doubt. On both sides proofs applicable to the case, considered either as an action at law or a suit in equity, were adduced at great length. Defendant did not object to the impaneling of a jury. If plaintiff had drawn his petition in conformity to defendant's understanding of equity pleading, the submission of issues of fact to a jury would have been in harmony with correct rules of practice. Defendant was not deprived of any opportunity to make a defense. The trial in fact lasted nearly a month. On the same evidence another trial of equal length in a court of equity would result in findings for plaintiff. On appeal, the objections to the form of the action, to the nature of the pleadings, and to the submission of issues of fact to a jury will be overruled. *Lashmett v. Prall,* 93 Neb. 184.

Defendant contends that the action is barred by the statute of limitations, the notes and mortgages having been held in his name for more than four years before the action was commenced. The proof tends to show that August Doll, for more than ten years before his death, bought and sold realty and personalty in the name of defendant, retaining absolute control over the property, defendant transferring title whenever requested by his uncle. During the latter's illness in 1909 defendant collected the interest on the notes and mortgages, and after his uncle's death in 1910 asserted absolute ownership of the property. The statute of limitations did not commence to run until defendant repudiated his trust and refused to transfer the notes and mortgages to plaintiff. *Davis v. Coburn,* 128 Mass. 377; *Schmidt v. Schmidt,* 216 Mass. 572.

The overruling of a motion to amend the answer is also assigned as error. The application was not made until the trial had been in progress eleven days. No satisfactory reason for the delay is given. It is not shown that the trial court abused its discretion in refusing permission to amend the answer.

Rulings of the trial court upon the admission of evidence and in the giving and refusing of instructions are also assailed, but prejudicial error in these respects has not been shown. The judgment is therefore

AFFIRMED.

HAMER and CORNISH, JJ., not sitting.

OMAHA ELECTRIC LIGHT & POWER COMPANY, APPELLANT, v. ROBERT BUTKE ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19456.

Pleading: PETITION: CONSTRUCTION. A petition should be construed with reference to the general theory upon which it proceeds, and where it thus states a cause of action for negligence, it is not error to refuse to construe it as also stating a cause of action for a trespass based on an allegation amounting to a legal conclusion.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

Crofoot, Scott and *Fraser,* for appellant.

Brogan & Raymond and *Fitzgerald & Lynch, contra.*

ROSE, J.

This is an action to recover damages in the sum of $467.29. The claim, according to the petition, arose in the following manner: Plaintiff had an underground conduit running lengthwise in a public alley in Omaha. In making an excavation for a building to be erected on a lot abutting on the alley, defendants removed the support from

the conduit, thus causing the injury of which complaint is made. From a verdict for defendants, plaintiff has appealed.

The controlling question for review is assigned error in the trial court's refusal to give the following instruction requested by plaintiff:

"You are instructed that a landowner does not have any right to go upon a public street or alley and make excavations for the purpose of erecting a building upon his own property, and one so doing or other persons doing so by reason of contract with the landowner are responsible in damages, if by reason of excavating in a public street or alley damage is caused to property which is lawfully located and placed in said alley upon the surface or beneath the surface of the land."

Defendants argue that this instruction was properly refused, because it would have permitted a recovery for a trespass in the alley under a petition narrowed to a charge of negligence in making the excavation. Plaintiff contends that the petition states a cause of action for both negligence and trespass. The decision hinges on the following allegations of the petition:

"That during the month of May, 1914, the defendants herein were engaged in the erection of a building for the Skinner Manufacturing Company on property extending from Jackson street south to the alley, and extending from the east side of Fourteenth street toward Thirteenth street for some distance, which the plaintiff is not able to state exactly, and that in the construction of said building the defendants herein caused an excavation to be made and dirt to be removed therefrom on the property owned by the Skinner Manufacturing Company, and also caused an excavation to be made and dirt to be removed in the alley south of the line of the property owned by said Skinner Manufacturing Company and in close proximity to the conduit maintained by the plaintiff herein, as heretofore described.

"That the defendants wrongfully and negligently caused the paving and the dirt under said paving to be excavated in the alley beyond the conduit of the plaintiff herein without taking proper precautions to prevent said dirt and paving materials from caving in and causing damage to said conduit, and the removal of said paving and the excavating of the dirt therein did cause a large portion of said dirt and paving material to cave in and to damage and destroy the conduit of the plaintiff herein and to damage the cable carried therein for a distance of forty-four feet. * * *

"That the plaintiff herein was obliged to expend said sum of $467.29 wholly through the negligence of the defendants herein."

The allegation that defendants "wrongfully and negligently caused the paving and dirt under said paving to be excavated in the alley" is pointed out by plaintiff as a charge of trespass, when considered with other averments. In this connection it is argued that "wrongfully," not being synonymous with "negligently," characterizes the commission of the acts as without legal right or excuse. To sustain this position reference is made to *Howard's Adm'r v. Hunter,* 126 Ky. 685. There the court was construing a statute creating a right of action for death by "negligent" and "wrongful" acts. In a pleading, however, the ultimate facts showing that an act is wrongful should be stated, the word "wrongfully," in absence of such a statement, being a conclusion. *Scofield v. Whitelegge,* 49 N. Y. 259; *Wallace v. Columbia & G. R. Co.,* 34 S. Car. 62; *Spahr v. Tartt,* 23 Ill. App. 420; *Schiffman v. Schmidt,* 154 Mo. 204. The language copied from the petition imports the theory of negligence. The mere use of the word "wrongfully," in absence of alleged facts constituting trespass, does not imply a cause of action based on that theory. If plaintiff intended to require defendants to answer for excavating in the alley in violation of law, the facts constituting trespass, as distinguished from negligence, should

have been pleaded in the petition. The trial court adopted this view, and thus followed the law. The rule is:

"A pleading should be construed with reference to the general theory upon which it proceeds; and a pleading should not be uncertain as to which of two or more theories is relied upon." Phillips, Code Pleading, sec. 354; *Spargur v. Romine,* 38 Neb. 736.

While some testimony tending to prove a trepass was adduced by plaintiff, it was applicable also to negligence —an issue properly raised by the pleadings and submitted to the jury under correct instructions. There was no error in refusing the instruction requested by plaintiff.

AFFIRMED.

BANK OF BENSON, APPELLANT, V. W. A. GORDON ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19738.

1. **Appeal:** CASE STATED. A "case stated," as contemplated by the rule for the advancement of cases, must include an agreed statement of the facts upon which the questions of law arise. Rule 14.
2. ———: ———. A "case stated" must be allowed and certified by the trial judge, must be filed with the clerk of the district court, and must be printed and bound with appellant's brief. Rule 14.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Motion to advance overruled.*

Daniel L. Johnson, for appellant.

Byron G. Burbank and *William Baird & Sons, contra.*

ROSE, J.

This is a motion to advance the case under rule 14 (Supreme Court Rules, 94 Neb. XIII), which provides:

"The parties may by agreement state the case to be presented to this court on appeal. The case stated shall in

plain language briefly recite the facts upon which the questions of law arise, and also any substantial conflict in the evidence as to any fact involved, and separately state and number the rulings of the court complained of, with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated will in such case constitute the bill of exceptions, and must be allowed and certified by the judge who tried the case, and filed with the clerk pursuant to section 7880 and 8194, Revised Statutes 1913. The case stated must be printed and bound with appellant's brief. A case so submitted will be advanced for hearing, if both parties desire."

The parties have agreed upon an abstract of the record which seems to be intended as a "case stated." It does not "in plain language briefly recite the facts upon which the questions of law arise." The rule contemplates a statement of the facts. An agreed abstract of the evidence from which the reviewing court is required to find the facts does not meet the requirment. A case stated is intended as a substitute for a bill of exceptions, and it must make findings of fact in the appellate court unnecessary. The document submitted with the motion to advance is wanting in the following particulars: It has not been "allowed and certified by the judge who tried the case." It has not been "filed with the clerk." It is not "printed and bound with appellant's brief."

The motion to advance is therefore

OVERRULED.

THOMAS SINCLAIR, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19405.

1. **Municipal Corporations: TAXATION: CONSTITUTIONAL PROVISIONS.** By section 6, art. IX of the state Constitution, the corporate

authorities of cities may be authorized by statute to assess and collect taxes for all "corporate purposes." The levy of a tax by the city of Lincoln for campus extension to induce the location of the state university favorably to the interests of the city is for a corporate purpose, and the provision of section 4546, Rev. St. 1913, authorizing such levy, does not violate that section of the Constitution.

2. ———: ———: LEGISLATIVE POWERS. The advisability of conferring this power upon the city is a question of public policy for the legislature, and not for the courts. Whether such location would have such effect was a question for the exercise of the reasonable discretion of the city authorities.

3. ———: ———: DISCRETIONARY AUTHORITY. The question for the city authorities to consider was the benefit of the city at large, and the fact that some parts of the city were or might be benefited more than other parts would not render the tax invalid. Individuals may be called upon to sacrifice some rights to the greatest good for the greatest number.

4. **Statutes:** AMENDMENT. The amendment of the statute giving the cities the authority to levy taxes for university campus extension is germane to the general provision of the statute specifying for what purposes such taxes may be levied.

5. **Constitutional Law:** MUNICIPAL CORPORATIONS: TAXATION. This tax being levied for a corporate purpose of the city of Lincoln, sections 1 and 4 of article IX of the state Constitution and the Fourteenth amendment to the federal Constitution have no application.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

F. B. Baylor and *D. J. Flaherty,* for appellant.

C. Petrus Peterson, George W. Berge, Charles R. Wilke and *Sterling F. Mutz, contra.*

SEDGWICK, J.,

The authorities of the city of Lincoln levied a tax upon the property of the city to raise money to purchase real estate adjoining the university campus for the purpose of the extension of that campus. The plaintiff brought this action in the district court for Lancaster county in behalf of himself and other taxpayers of the city similarly situated to enjoin the collection of the tax. The district court

found no equity in the petition and dismissed the case at plaintiff's costs. The plaintiff has appealed.

In 1913 the legislature amended the statute which confers power upon the city to levy taxes, and added the following as additional purposes for which such taxes might be levied by the city: "The council shall have the power to levy and collect a tax not to exceed five mills in addition to the tax hereinbefore authorized for the purpose of purchasing, holding and improving public grounds and parks, park extensions and improvements, and university campus extension." Laws 1913, ch. 5, sec. 3 (Rev. St. 1913, sec. 4546). The Constitution of the state provides: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Article IX, sec. 6. Section 4 of the same article provides: "The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

It is contended that the legislative act attempting to give the city power to levy taxes for "university campus extension" is violative of these provisions of the Constitution. The argument is that the university is a state institution, and that it must be supported by the state at large, and that to place a larger part of this burden upon the city of Lincoln in effect releases other portions of the state from their "proportionate share of taxes to be levied for state purposes," and therefore violates section 4, above quoted. By section 6, above quoted, the corporate authorities of cities may be authorized by statute to assess and col-

lect taxes for all "corporate purposes," so that the question is whether this tax so levied by the city was for corporate purposes. The petition in this case alleged that when this action was begun a general election was about to be held in the state of Nebraska to determine whether the university, except the college of medicine, should be removed to the state farm, or the colleges of the university generally should be located "on the present city campus and on land contiguous thereto," and "that all of the buildings of the university of Nebraska, except the college of agriculture, are now located" upon the present city campus, and that the levy in question "is for the purpose of purchasing ground to the east of said location and extending said grounds." It appears that the object of levying this tax was to, in effect, donate this money to the state for the university for the purpose of inducing the state to continue the location of the university at its present site in the city of Lincoln, rather than to remove it to the state agricultural farm, which is about two and one-half miles east of the present location and is just without the limits of the city of Lincoln. Is this a corporate purpose? Can the legislature authorize the city to donate money for the purpose of retaining the university within the city and at such point therein as shall be found to be most advantageous to the city and its inhabitants? If such donation is for a corporate purpose, then the legislature may authorize the city to do so under section 6 of the Constitution, above quoted. Some of the authorities cited in plaintiff's brief seem to hold that such tax is not for a corporate purpose and is invalid. Under a somewhat different constitutional limitation, it was held that the state might authorize such a tax. *Merrick v. Inhabitants of Amherst,* 94 Mass. 500. The court said: "It may at first sight seem as if the establishment of a college and its endowment and support by the the commonwealth for the education of all persons within the state who might wish to receive instruction in certain branches of science or art would stand on the same footing as the public schools, and that money raised for such an

object ought to be apportioned and distributed in such manner as to bear on all persons and property equally, without a resort to local taxation, which would operate partially, and in a certain sense disproportionately. * * * If the establishment of a public institution of general utility or necessity in a particular locality would be productive of direct and appreciable benefit to persons or estates in the vicinity, either by increasing the value of property there situated, or by the opportunities which it would afford to those residing in the neighborhood to enjoy certain common advantages and privileges with greater facility and at a less cost than others having an equal right to participate in them, but who reside or own estates more remotely situated or in distant parts of the state, we can see no reason why these special advantages or benefits should not be taken into consideration in determining the mode in which the public burden of defraying the cost of the institution should be apportioned and distributed. * * * In this view, it seems to us that the statute by which the legislature empowered the town of Amherst to assess on its inhabitants a tax of fifty thousand dollars, to raise money to be paid to the Massachusetts agricultural college, was legal and valid, and within the scope of constitutional authority conferred on the legislative department of the government."

In *Marks v. Trustees of Purdue University*, 37 Ind. 155, the court said: "While the university is a state institution, and every citizen will have an equal right, under the same circumstances, to avail himself of its privileges, still the location of it in a given county will, doubtless, confer upon that county many local benefits of pecuniary value. The parents of the county can send their sons and perhaps their daughters to the college to be educated, at a less expenditure of time and money than would be incurred if it were situated at a more remote point in the state. The college, with its professors, tutors, attendants, and students, will probably diffuse much more money throughout the community than would otherwise circulate. It may also

add to the educated and intelligent population of the place, and be the means of stimulating the industry and increasing the wealth and moral worth of the community, thereby enhancing the attractions of society and the value of property. There may be other and greater local benefits than those above glanced at. Now, it seems to us that taxes collected to discharge an obligation entered into by the county, solely for the purpose of securing the location of the college in that county, cannot be said, in any just sense, to be collected for any state purpose. On the contrary, they are solely for a county purpose."

The tax complained of was levied for the purpose of directly or indirectly influencing the electors of the state to locate the main university buildings at the point thought to be beneficial to the city at large. Whether such location would have such effect was a question for the exercise of the reasonable discretion of the city authorities. The advisability of conferring this power upon the city is a question of public policy for the legislature, and not for the courts.

The plaintiff has property and resides near the grounds of the agricultural college, one of the locations then being considered for the main university buildings. He contends that it would be more advantageous to him and render his property more valuable if these buildings were located near his property than if they were located on the campus or an extension thereof in the main part of the city, and that therefore this tax as it affects his property is compelling him to pay for that which does not benefit but rather injures him. But the question for the authorities to consider was the benefit of the city at large, and the fact that some parts of the city were or might be benefited more than other parts would not render the tax invalid. Individuals may be called upon to sacrifice some rights to the greatest good for the greatest number. This tax being levied for a corporate purpose of the city of Lincoln, sections 1 and 4 of article IX of the state Constitution and the Fourteenth

amendment to the federal Constitution have no application.

There is no ground for the contention that the amendment of the statute giving the cities the authority to levy taxes for university campus extension is not germane to the general provision of the statute specifying for what purposes such taxes may be levied.

The judgment of the district court is

AFFIRMED.

HENRY MILLER, APPELLEE, V. MORRIS & COMPANY, APPELLANT.

FILED APRIL 14, 1917. No. 19880.

Appeal: CONFLICTING EVIDENCE. Under the employers' liability act (Laws 1913, ch. 198), where the case is heard in court before a judge of the district court upon conflicting evidence, and where there is competent evidence sufficient to sustain the finding, the judgment rendered by the district court will not be set aside on appeal unless it is clearly wrong.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

James C. Kinsler, for appellant.

Stout, Rose & Wells, contra.

HAMER, J.

The plaintiff and appellee brought this action in the district court for Douglas county under the employers' liability act (Laws 1913, ch. 198) to recover compensation from the defendant and appellant for the alleged total loss of the use of his left arm in an accident arising out of the course of his employment. It seems to be conceded by the defendant that the accident happened at the time and place and in the manner alleged by the plaintiff, but the defendant denied that the plaintiff had lost the use of his

left arm as alleged by him, and further denied that he had been disabled more than a few weeks. It is shown that at the time of the injury the plaintiff was working for the defendant, and that the defendant was operating under the said statute, and it seems to be admitted that the rights of the parties are to be determined under and by virtue of such statute. The plaintiff's injury was sustained in the course of his employment and he is damaged. The average weekly wage earned by the plaintiff during his employment by the defendant was $13.52, and the plaintiff claims that the rate of compensation to which he is entitled is $6.76 a week for 215 weeks. It is admitted that plaintiff received a cut across his left wrist April 19, 1916, which severed the tendons connecting the muscles of his forearm with the four fingers of his left hand, and also severed the ulnar nerve and partially severed the median nerve. The plaintiff claimed that he had permanently lost the use of his left arm and hand. The defendant claimed that some infection developed which resulted in adhesions forming between the injured tendons and the sheaths by which they are covered. There was a contention on the part of the defendant to the effect that there had been no injury to the plaintiff's left thumb, and that, while the tendons in the wrist had been cut and the fingers had become stiff, yet since the 15th of June, 1916, the plaintiff's hand had been in good condition, and that he will regain the use of his second, third and little fingers of the left hand, and that the first finger had so improved by June 15, 1916, that he had been able to use it in connection with the thumb on his left hand; and that as his hand now is he can make use of it in performing his work in the hog gang of the defendant; that he could have returned to his work in the hog gang at least a month before the trial, but did not do so; that he was a butcher in the packing trade, but could do almost anything in the cutting and dressing of hogs; that until the day he was injured he shaved them sometimes, and that he gutted hogs sometimes; that he would also sometimes cut the heads off hogs, and at other times he would trim

shoulders and bacon; that after the hogs are killed they are carried along on an endless chain, and the butcher can steady the hog with his left hand and take his knife in his right hand and reach up and start through and open the hog up all the way down to the neck. The defendant contends that, notwithstanding the condition of the plaintiff's stiff fingers, he could still work in the hog gang and use his left hand to steady the hog while he held the knife in his right hand and did the cutting with it, or, if he was shaving hogs, that he could take hold of the hog with his left hand as it came along and turn it around while he shaved it with his right hand; and in sticking hogs it is claimed that all he would have to do as the hog came along on the chain was to put his left hand on the hog to steady it, while he used his knife in his right hand to do the sticking. One of the witnesses testified that the hogs came along at about the rate of seven a minute, and sometimes it only took a slight pressure to turn the hog around, and at other times "they turned mighty hard." It is claimed that the plaintiff's left hand and arm are strong enough to do this kind of work in which he was engaged at the time he was injured. It is also claimed that the defendant's foreman tried to get the plaintiff to go back to work, and that the defendant was then, and still is, ready to give him work.

The defendant seriously objects to the judgment of the district court, and seems to be in earnest that the plaintiff should receive nothing, or at least very little.

There appears to be no dispute that there was a deep cut in the wrist which severed the tendons connecting the muscles of the forearm with all four of the fingers of the left hand, and which also severed the ulnar nerve and partly severed the median nerve; and there was also an infection which prevented the healing; and there is evidence that at the time of the trial, four months after the accident, the lower part of the left hand was without a sense of feeling, and also the last two fingers of that hand, and that a needle could be stuck in that part of the hand without being felt; and there was also only a partial sense

of feeling in the middle finger of that hand; also that the forefinger of the left hand was so stiff that it could not be brought in contact with the thumb, and that the thumb could not be laid over so as to touch the palm of that hand. In any event the hand was badly crippled. Dr. Betz testified he did not expect the plaintiff to be able to use his hand for any ordinary purpose of manual labor.

There are perhaps some minor questions which we do not deem it necessary to discuss.

Subdivision 3, sec. 3662, Rev. St. 1913, provides: "For all disability resulting from permanent injury of the following classes, the compensation shall be exclusively as follows: For the loss of a hand, fifty per centum of the wages during 175 weeks; for the loss of an arm, fifty per centum of wages during 215 weeks."

In this case the hand was injured, and also the arm was injured, and the trial court had before it the consideration under the facts of both these subdivisions.

It should be remembered that the judge who heard this case saw the witnesses and heard them testify. He had a better opportunity to determine the facts than we have. He also must have seen the injured wrist and the stiffened fingers and perhaps the arm, and he could therefore tell whether they corroborated the testimony of the witnesses. The district court found that the plaintiff had permanently lost the use of his left hand, and allowed him compensation for 175 weeks. Of course, it might be contended with some show of right that something of the hand is yet left, and that it may still be useful to the plaintiff; but, if he did not lose all of his hand, he probably did lose the use of his arm to some extent, because the deep cut severed the tendons in the wrist and severed the ulnar nerve, and partly severed the median nerve. His wrist and arm will probably never be as good as they were before the injury.

The judgment contains an elaborate finding, and closes with: "It is therefore considered, ordered, and adjudged by the court that the plaintiff have and recover of the defendant, Morris & Company, judgment in the sum of

$143.96, with 7 per cent. interest from this date, and that execution issue therefor; that the defendant pay the plaintiff further compensation weekly at the rate of $6.76 per week, beginning with the date of this judgment and ending at the end of a period of 175 weeks after the 19th day of April, 1916, and that the costs of this proceeding be taxed to the defendant." The judgment is dated on the 24th of August, 1916.

This case was tried before a judge of the district court and without a jury. In *National Bank of Ashland v. Cooper,* 86 Neb. 792, it is said in the body of the opinion: "The rule is settled beyond question, in this jurisdiction, that when an action at law is tried without the intervention of a jury the findings of the trial court are entitled to the same consideration by the appellate court as is the verdict of a jury." *Evans v. De Roe,* 15 Neb. 630. It is also well settled that a verdict based on conflicting evidence will not be set aside unless it is clearly wrong. *Woods v. Hart,* 50 Neb. 497. In *Hare v. Winterer,* 64 Neb. 551, it is held, as stated in the syllabus: "The finding of a trial court upon an issue of fact is conclusive in this court, unless clearly wrong."

The case was heard in the district court upon conflicting evidence, and it appears to have been competent and quite sufficient to sustain the finding and judgment of the district court. We do not feel at liberty to set aside the judgment, and cannot do so under the rule established, unless it is clearly wrong.

The judgment of the district court is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

FRANCES A. RANKIN, APPELLEE, V. ELIZABETH KOUNTZE REAL ESTATE COMPANY, APPELLANT.

FILED APRIL 14, 1917. No. 18846.

Landlord and Tenant: DEFECTIVE PREMISES: LIABILITY OF LANDLORD. "The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor." *Davis v. Manning*, 98 Neb. 707.

Rehearing of case reported in 100 Neb. 69. *Former judgment of affirmance vacated, and judgment of district court reversed, and action dismissed.*

DEAN, J.

This case is here on rehearing. The former opinion is reported in 100 Neb. 69, and in which a lengthy statement is made. There are a number of points discussed in the briefs upon which the evidence is conflicting. The verdict of the jury settled these questions of fact. Among them are whether the plaintiff's foot was injured, as she contended, by a puncture from a concealed nail in a threshold, or whether, as the testimony for defendant tended to prove, it was injured by a nail in the heel of her shoe. At all events, the immediate cause of her injury was blood poisoning caused by an infection. The verdict settled the question whether the injury by the nail was the proximate cause of the infection or whether the wound was infected afterward from another source. Two questions remain to be considered, whether, conceding the facts established as the plaintiff claims, the landlord is liable as a matter of law for injuries resulting from a hidden defect in a threshold of which he has no knowledge, and whether the evidence supports a verdict based upon a promise, made before the plaintiff took possession, to put the premises in repair and keep them in repair.

The evidence as to the condition of the threshold is about as follows: The plaintiff's brother, a street car conductor, who lived with her, says that they finished moving upstairs late in the afternoon, that about 9 o'clock at night his sister told him she had stepped on something; that he first looked in the hall, but found nothing, he then looked at the threshold. He testifies: "I could see nothing by observation on the top of it. I examined it. From the appearance on the top you could not tell that there was anything wrong, but on bearing my weight on it I found there was a spring in the threshold, and on moving my hand along over there to see whether there was anything on the threshold, thinking there might be something wrong in a case like that, I found that there was a nail protruding from the threshold, which was a piece of board nailed over the threshold. Q. How did you discover that would show above the board? A. By weighting down with my knee and feeling with my hand. The weight of my hand by bearing down with the hand would not spring down enough. Q. And the weight of your knee? A. With the weight of my body on the knee, and that on the threshold, would make the nail protrude through. Q. How far would it protrude through? A. With my left it was possibly a quarter of an inch." The next morning he examined the threshold again. He was unable to pull the nail with a hammer, but, by raising the piece of wood that had been nailed down, he pulled the nail by the use of pliers. He was then asked: "Q. Could you see anything wrong with it by looking at it from a distance in the room. A. No, sir. Q. You could not see the concave under it? A. No. sir."

The plaintiff testified that she first knew the board would spring down when she stepped upon it, and, on being asked when she first discovered the nail, answered: "We noticed it that evening first, and then we examined it more thoroughly the next day. Q. Before or after the injury? A. After the injury. Q. Before that, did you notice anything wrong with that threshold? A. No." Mrs. Mc-

Elhinney testified: "Q. And stepping on the board or threshold there, state what you could see, if anything, concerning the nail you mention. A. Nothing at all except the threshold." Another witness for plaintiff who lived across the hall testified that he noticed the board about two weeks before the plaintiff moved in, and that the board had a tendency to spring when it was stepped on. On cross-examination he testified: "Q. When you stepped on it was your attention attracted to any loose nails in the board? A. No, sir."

Norlen, the man with whom the plaintiff changed apartments, testified that he nailed the board on the threshold in October, 1909, that he moved out of the apartment the same day that Mrs. Rankin moved in. He then testified: "Q. Was there anything to call your attention to the nail in any way? A. No. Q. Did you and your children use that doorway? A. Yes, we did. Q. Had you or your family heard of any nail in that threshold? A. No. Q. I will ask you Mr. Norlen whether at or about the time you left there that threshold was in a condition so as to move up and down if anybody stepped on it? A. I could not say. I never noticed it. I did not pay any attention to it. Q. Was there anything about the appearance of the threshold or its condition to challenge your attention or call your attention to the fact that it was movable and moving up and down? A. No."

This is the substance of the testimony in favor of the plaintiff with respect to the condition of the threshold. For defense, those in charge of the building testified they never heard of any defect in the threshold until this suit was begun, two years after the alleged accident, and that Norlen had no authority to make repairs. It is undisputed that the defect in the threshold was not obvious and open to observation, and that it had not been seen by any one until after Mrs. Rankin was hurt. Plaintiff conclusively established the fact that the defect was latent and hidden. She produced no evidence that the lessor or his agents had any knowledge or notice of the defect, and their testimony

is undisputed that they neither knew nor had any reason to suspect such a condition.

Can a landlord be held liable as a matter of law for an injury resulting from such a latent defect of which neither he nor his agents had any knowledge? This question is settled in this state by the case of *Davis v. Manning,* 98 Neb. 707, wherein the opinion examines the authorities and lays down the rule: "The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor." The condition of the case brings it clearly within the rule in *Davis v. Manning,* and there can be no recovery on this theory.

Upon re-argument and re-examination of the case, we are satisfied that the agreement to make repairs, even if it was as the plaintiff states it, would not include such defect, if it existed as described by plaintiff and her witnesses. The testimony, not only of the witnesses called by defendant, but as well those called by plaintiff, establish the hidden nature of the defect. The testimony discloses that it comes within the generally accepted and recognized definition of the expression "latent defect" as used by law-writers. On this point the law seems to be well settled. *Bennett v. Sullivan,* 100 Me. 118, announces a rule that is generally accepted: "The owner of private property owes to a prospective lessee no duty to exercise ordinary care to ascertain and apprise him of unknown defects in the property to be leased where such prospective lessee has equal opportunity to ascertain the defects." *Walsh v. Schmidt,* 34 L. R. A. n. s. 798 (206 Mass. 405) holds: "A statement by a property owner to a prospective tenant that he has fixed the house all right, that it is fit for anybody to live in, does not constitute an express warranty that there are no latent defects which may cause injury to the tenant." See, also, *Cate v. Blodgett,* 70 N. H. 316; *Morgan v. Shep-*

pard, 156 Ala. 403; *Howell v. Schneider*, 24 App. D. C. 532; *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 68 Ohio St. 328.

Our former judgment is vacated, and the judgment of the district court is reversed, and the action is dismissed.

REVERSED.

HAMER, J., dissenting.

This case is to recover damages for an injury done to the plaintiff through the negligence of the defendant by its servant, one Norlen.

The case of *Davis v. Manning*, 98 Neb. 707, was wholly unlike it. There the plaintiff had lived for several months in the house which she had rented, and she had been an occupant of the house before the time of her occupancy when injured. She knew that the floor was rotten. She knew that because there were holes that had rotted through it and which were patched up with tin. These pieces of tin were scattered over the floor of the kitchen. Each piece covered a hole. This fact is undisputed. There was no attempted denial of it. An examination of the original petition filed in that case shows that the plaintiff claimed that she "did not know of the rotten and defective and dangerous condition of the floor;" that she was preparing her breakfast and was standing near the front of her stove and was about to step from the stove to the pantry, and that "a part of one of the floor boards broke through, causing a hole about 7 by 2½ inches in size, into which the heel and a portion of plaintiff's left foot passed, thereby throwing plaintiff, * * * and crushing and bruising her left side, and fracturing and breaking her left thigh bone."

In the answer the injury does not appear to have been denied, but it was claimed that the plaintiff "had occupied and lived in said house since about the 1st day of May, 1905," and prior thereto, and that the condition of said premises was fully known to plaintiff, and was open

and obvious to her. It was said further that she assumed the risk.

Judge Sedgwick wrote the first opinion (*Davis v. Manning,* 97 Neb. 658), in which he says: "There is, however, substantial evidence, as we have said, by at least three witnesses that there had been openings in other parts of the kitchen floor which had been covered with tin," that "plaintiff's original petition was in evidence, and it contained the allegation that in other parts of the floor there were cracks and openings, and that she had requested the defendant's agents to repair the same. The defendant contended that this proved that the plaintiff had notice of the condition of the floor, and was therefore guilty of contributory negligence. The plaintiff in her evidence at the trial testified that she knew that these cracks existed in other parts of the floor and that they had been repaired." It was also all the time contended: "That plaintiff knew of the condition of the floor." On the rehearing of *Davis v. Manning,* 98 Neb. 707, it is said: "It was plainly to be seen that there were no ventilators under the kitchen, and the tenant must be held to have equal knowledge of the law of decay as the landlord."

In the instant case Norlen testified: "Q. You paid nothing for your rent for that reason? A. No. sir. Q. With whom did you make this arrangement? A. Payne & Slater. Q. They were the agents of that building? A. Yes, sir." Norlen was asked: "Q. Was one of your duties to look after the other tenants in the building? A. My duty was to shut off and turn on—shut off and turn on the water in the winter when the cold weather was on, and look after the plumbing." Payne & Slater were the agents for the building, but a man named Porter also helped with the rents.

Edwin M. Slater testified that the repairs were made through Mr. Porter; that Mr. Porter represented the firm of Payne & Slater in looking after the property of the Elizabeth Kountze Real Estate Company; that he had charge of the building and collected the rents. Slater also

testified that they had a man down there who occupied one of the apartments. "Q. And do you know as to who was janitor down there, and who had matters in charge in any way? Do you know anything about that? A. Yes, we had a man. I forget his name. He was down there occupying one of the apartments. Q. Do you know his name? A. No, I forget his name. Q. Was it Norlen? A. Norlen, I think that was the name. Q. Norlen? A. Yes, sir. I think that was the name."

He then testified that Norlen received his rent free. Janitors are found in apartment houses all about, and they do not pay rent because they are servants and are therefore kept in the houses for the benefit of the property and its occupants. "Q. What were Mr. Norlen's duties there? A. Mr. Norlen was put down there mainly because we had had a lot of trouble with the water pipes freezing out, especially at night when there wasn't any water drawn off, and the water would stand still, and so his duties were to shut the water off at the base of the supply line in the basements, and then turn it on in the morning. His duties also were to notify our office of any vacancies (empty apartments), and to collect the keys and take care of the keys down there."

Appleby testified that Norlen made repairs. "Q. Do you know whether Mr. Norlen made some repairs in and about the building? A. Well, he done some repairing." Mr. Grimmel testified that his company was to, and did, make some repairs on the building.

It will be seen that he was discharging all the duties of a janitor, and, in addition, he was assisting the company's agents by taking care of the keys and notifying the office when tenants had gone out. He was assisting in keeping the premises occupied. In addition to that, as he himself says, he turned the water on and turned it off and looked after the plumbing. The witness further testified on cross-examination that he (Norlen) may have made some repairs. I think that he looked after the yard and mowed the grass, if there was any there, and mowed weeds and

something like that. Mr. Slater was candid enough to testify: "Q. And what he did was for your firm? A. Yes, sir. Q. And Mr. Porter was representing the firm? A. Yes, sir."

Norlen was the servant of the defendant real estate company. He stayed at the building to watch it and to perform the duties of a servant. He stayed at the building to turn the water on as it was needed, and to turn it off when it threatened danger by freezing up and bursting the pipes. He cut the grass on the lawn. He gathered up the keys when the tenants left, and he was their custodian. He notified Payne & Slater when the rooms were vacant. He did what any servant entrusted with such duties would have done. He was occupying the room in which the plaintiff was hurt just previous to the time when she received her injury. The plaintiff and Mr. Norlen talked over the question of exchanging rooms. It was then agreed that Norlen should go out of the room where Mrs. Rankin was injured, and that he should go down into the basement formerly occupied by Mrs. Rankin, and she was to go up-stairs into the room which had been occupied by Norlen up to that time. Payne & Slater agreed to it, and thereupon the removal was made. On the evening of the day when the removal was made, late in the afternoon, Mrs. Rankin started to go to the toilet. She had probably been in her new apartment not more than two hours, and she knew nothing about the danger that threatened her. She was in her stocking feet. She stepped on the board which Norlen had placed over the threshold. Immediately the nail that was still in this board came up through it. It ran into Mrs. Rankin's heel. No one denies what happened there. What Norlen did was alleged to be done "for his own convenience." Counsel for the defendant sought to excuse his client. Norlen was not there on his own account, but as the servant of the defendant real estate company. Slater says so. Norlen was to take care of the property. Regardless of that duty he placed a dangerous trap in the threshold. Mrs. Rankin had not seen it. The nail was in-

visible. Of course, if the board extended over the threshold, which was of soft wood, it would bend down when Mrs. Rankin stepped upon it and the nail would then run up into the heel. It was that nail which made an injury that resulted in all the bones being removed from Mrs. Rankin's heel.

Caveat emptor applies where there is no fraud and no injury that is the result of negligence upon the part of the landlord and his servants. The job which Norlen did should have been done in a workmanlike manner by a carpenter. The company did this work with a bungling servant instead of doing it with its carpenter. The carpenter would have known how to fix that threshold. He might have charged more than the janitor cost the landlord, but he would have left a proper threshold there. The duties of a janitor are probably becoming greater as more apartment houses are constructed. The landlord is engaged in an effort to extend the service of the janitor. It is like a railroad company attempting to use a brakeman as an engineer. The janitor not only makes fires and takes away the ashes and garbage, but he may put the screens in the windows and take them out, and he may turn the water on and off, and look after the plumbing and try to make a plumber of himself. He does all this with his landlord's consent. He may also cut the grass and weeds and get new tenants and new keys for the apartments, and he may occasionally put in a new electric lamp with its wire and its necessary connections. He is the servant of all work in an apartment house by the direction of his landlord. The room which he occupies is always rent free. That is one of the badges that marks him as a servant.

Nothing was said in the original opinion which was in anyway entitled to be called a criticism upon the private character of any member of the defendant company.

If Mrs. Rankin's case should be submitted to a man sitting as a judge or a juror and having many farms or houses in the city, he might shut his eyes and ears to the evidence in spite of an upright and honest desire to be fair.

If the judgment in this case in favor of Mrs. Rankin shall finally be set aside, I shall never feel sure of anything that my friends may write, however it may be justified by the evidence.

On rehearing of *Davis v. Manning,* 98 Neb. 707, cited on behalf of the appellant, the syllabus reads: "The rule of *caveat emptor* applies to leases of real estate, and, in the absence of warranty, deceit, or fraud on the part of the lessor, the lessee cannot recover for personal injuries received through latent defects therein, of which the lessor had no knowledge at the time of making the lease, and which were as patent to the lessee as to the lessor."

It was all right in *that* case to apply the rule of *caveat emptor,* because the plaintiff then had an opportunity to know the condition of the floor where she was standing, and she did know it if she had thought of the facts within her knowledge. She had all the opportunity to know it that the landlord had. She knew of the repairs. She saw the pieces of tin covering the holes that had rotted through the floor. But the rule of *caveat emptor* is all wrong in the instant case, because here the plaintiff had no opportunity to know the condition of the threshold on which she stepped, and she did not know it until the nail pierced her heel and she fell down screaming and her brother ran to help her. Judge Sedgwick in his dissent said: "We should probably follow the rule of *caveat emptor,* which is so well established in this country. It has been a little difficult to apply this rule with exact justice in some cases, and some of the opinions seem a little extravagant in protecting reckless landlords. The rule should not be strained in favor of shrewd landlords, who are familiar with the construction of buildings and the general condition of the same, against an elderly lady who has no such knowledge and experience, and who must necessarily rely upon the good faith of the landlord." Judge Fawcett appears to have believed the same way, because he joined in Judge Sedgwick's dissent. Of course, if Mrs. Davis did not know the condition of the floor and

had no good reason to know it, then it is difficult to understand why Judges Sedgwick and Fawcett were not right in their dissent. The way to beat Mrs. Davis in her case was to exact of her the same high standard of knowledge of cause and effect that might naturally be expected of a man of wide education, broad experience, and accurate judgment. When she saw the repairs made on the kitchen floor she might have had reason to suppose that a greater or less number of the boards in the floor were rotten on the under side. That knowledge, if she had been able to reach a right conclusion concerning it, would have shown her that she was in danger if she continued to use the floor. But the *Davis v. Manning* case falls very far short of the instant case, for Mrs. Rankin had no visible thing to tell her what was wrong, and that a horrible danger was beneath her feet.

Judge Sedgwick cites *Hines v. Willcox,* 34 L. R. A. 824 (96 Tenn. 148), where it is said in the third paragraph of the syllabus: "A landlord is liable to his tenant for damages that may result from the unsafe and dangerous condition of the premises leased when that was known to, or with reasonable care and diligence might have been known to, the landlord, but not to the tenant, although the latter examined the premises and did not discover the defect."

In *Lindsey v. Leighton,* 150 Mass. 285, it was held that it was not necessary to show that the owner had actual knowledge of the defects; that his duty was that of due care, and ignorance of the defect was no defense in the absence of such care.

In 1 Pingrey, Real Property, sec. 592, it is said: "Of course, if there is a concealed defect which renders the premises dangerous which the tenant cannot discover by the exercise of reasonable diligence, of which the landlord has or ought to have knowledge, it is the landlord's duty to disclose it, and he is liable for an injury which results from his concealment of it."

If we apply the above doctrine to the instant case, the fact that the servant who fixed the threshold knew the condition that it was in, or ought to have known it because he did it, was knowledge of the landlord. If the servant knew it, the landlord knew it. The officers of a railroad company do not generally know of the negilgent acts of their employees at the time they are committed, but the railroad company is nevertheless held liable for the wrongs and injuries which their employees commit through negligence.

That Norlen notified Payne & Slater when the tenants went out, and that he took care of the keys, shows that he was assisting somewhat in the conduct of the business. He was undoubtedly helping to get tenants. He helped to get Mrs. Rankin as a tenant. She would never have moved up into his room but for the fact that he was willing that she might. If she had not found a better room than the one she occupied in the basement she might have left the premises. Norlen was an active man or he would not have been there. The man who lives in a part of my house without paying rent, and who helps take care of the house and the lawn, is my servant.

In Webster's New International Dictionary, servant is defined: "(2. Law) any person employed by another and subject in his employment to his employer's directions and control; an agent who is subject to the direction and control of his principal. *Servant* is defined in the codes of some states of the United States as 'one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master.' (3) One who serves, or does services, voluntarily or on compulsion; a person who is employed by another for menial offices, or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper."

Norlen was clearly a subordinate helper. Payne & Slater could not stay out there in the building and turn the water on and off, nor could they remain there to gather up the keys when the rooms were vacated. Norlen was quite an efficient helper so far as they were concerned. Neither of them fixed the plumbing or cut the grass and weeds. They were running a great real estate renting agency and were all the time agents of the defendant company. What the servant did in this case was towards the maintenance of the apartment in a habitable condition. That was clearly within the line of his employment. He put the threshold in to keep the cold out and to make the room habitable.

In *Younkin v. Rocheford,* 76 Neb. 531, the act done was to pick up a bucket containing oil and throw it on the fire in a brick-kiln. The man who did it had nothing to do with burning the brick-kiln. He was not there for that purpose. He was engaged solely to press brick on a table, and the oil which he used was to be used on the roller to oil the tables. He was a brick-maker, but he was not a brick-burner. He used the oil for another and different purpose than that for which he was employed, and therefore he was clearly outside of the scope of his authority. He caused a man to be dangerously burned.

In *Neff v. Brandeis,* 91 Neb. 11, it was held that, to sustain a recovery for injuries caused by being run down by an automobile owned by the defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was at the time of the accident engaged in the master's business, or there with the master's knowledge and direction. The defendant in that case had loaned his cars to a third party, and he took it to a garage, and it was sent out by the garage in charge of their man and for the use of the borrower. The chauffeur was returning the car to the garage when he ran into a vehicle that was driven by the plaintiff, and then and there committed the injury. The garage had loaned the car without the consent of its owner.

The nail protruded. It had been driven through an elastic springy board. The nail caught and was fast down in the lower part of the board of the threshold and the floor. Because the board was springy and would work up and down over the sharp end of the nail there was danger to any one who might step upon it. When the head of the nail broke off, of course the board would come up because no longer retained in its place. When Mrs. Rankin stepped upon the board it went down because it was springy and because there was a concave space in the threshold that was directly beneath the board and which was unoccupied. This board was of soft material. It was less than an inch in thickness. It is uncontroverted that it was springy. It was probably not quite as thick as Norlen's testimony would make it. If the board was of elmwood or soft pine or basswood or any other soft wood it was not likely to be firm under the feet of any one who stepped upon it.

We are used to the idea that the railroad company must pay damages for the negligence of its servant. We are hardly accustomed to the other idea as yet that a real estate company must also pay.

Norlen was there at the request of the renting agency, Payne & Slater. The renting agency acted for the owner, but was obliged to do so through its assistants. Norlen was one of its assistants. He was the servant on the ground and in the immediate possession of the premises. Norlen could do what he did because whatever he did was done directly by permission of the renting agency which acted for the owner and which assisted the owner in taking care of the property and in renting it. In *Young v. Rohrbough*, 84 Neb. 448, it is held that where the landlord leased premises which were defective in construction, and an injury occurred because of such defect, then the landlord is liable if he knew, or under all of the circumstances ought to have known, of such defective condition. The plastering in that case fell off the walls of a room and killed a lady member of a fraternal society occupying it. The principle declared in that case has never been denied by this court.

Nor has it been changed, although the former judgment was vacated, but for another reason than that given in the first opinion. *Young v. Rohrbough,* 86 Neb. 279. The former judgment was vacated because, "Where all of the defendants are by the court's instructions placed in the same relation with respect to plaintiff, a verdict in favor of two defendants and against another, based upon conflicting evidence which is the same as to all of the defendants, will not be permitted to stand"—citing *Gerner v. Yates,* 61 Neb. 100. The original opinion should be allowed to stand, or one reaching the same conclusion. Norlen did a bad job. He was the servant of the defendant. What the real estate company did it did through him. He should have taken out the remnant of the threshold and should have built it up from the bottom. If he had done this, even though he was a poor workman, Mrs. Rankin would not have been hurt. But a carpenter should have been employed. I am not forgetful that a majority of this court voted to adopt the opinion which we published to the world as our opinion, and, in addition, one other member of the court said the conclusion was right, and all this was done after a full consideration by the whole court and after several of us had contributed our share to the opinion as it finally stood when it was voted upon. I think that the verdict of the jury settles the question in favor of the plaintiff as to how the injury was received. It also settles the question that Norlen was the servant of the defendant real estate company. There is abundant evidence to sustain the finding of the jury as to both matters. No one interfered with Norlen's duties. They were exclusively his. He lived in the room rent free. He turned the water on and off. He cut the weeds. He kept the keys and looked for tenants. He was in direct communication with the real estate agency that had charge of the renting of the house. The contention of the defendant that Norlen was not a servant would not now be made by defendant's counsel were it not with the hope of getting rid of the judgment.

KATZ-CRAIG CONTRACTING COMPANY, APPELLANT, v. CITY OF COZAD, APPELLEE.

FILED APRIL 14, 1917. No. 19212.

1. **Municipal Corporations: CONTRACTS: ESTIMATES: CONCLUSIVENESS.** Where a contract for the installation of a municipal water-works system provides that final payment shall be made when the work has been approved and accepted by the city council or by the engineer, and where after installation the city council took possession of the plant and used it continuously for more than three years without complaint, a final estimate issued by the engineer, immediately before such appropriation of the plant by the city, which designates a given sum as the "balance due contractor," in the absence of fraud or of such gross mistake as to imply bad faith or a failure to exercise an honest judgment, is conclusive as between the parties.
2. ———: ———: ———: ———. The evidence examined, discussed in the opinion, and *held* that the supervising engineer employed by defendant to inspect and approve the construction of the water-works system in suit is the sole arbiter as between the contractor and the city, and that in the absence of fraud a final estimate issued by him certifying the amount due the contractor is binding upon the parties.
3. **Contracts: CONSTRUCTION BY PARTIES.** Where a contract is ambiguous in any of its terms, the interpretation mutually placed thereon by the parties thereto is conclusive as to their respective rights arising thereunder.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Reversed, with directions.*

Isidor Ziegler and *E. A. Cook*, for appellant.

Wilcox & Halligan, contra.

DEAN, J.

The city of Cozad entered into a contract to pay the Katz-Craig Contracting Company of Omaha $34,400 for the installation of a water-works system. The plant was duly installed by the company, and partial payments were made from time to time by the city to apply on the contract price on estimates furnished by Hershey S. Welch a con-

structing engineer who was employed by the city. The contract is dated September 14, 1910. This suit was begun on October 6, 1914, by the Katz-Craig Contracting Company, plaintiff and appellant, in the district court for Dawson county to recover $7,291.65 from the city of Cozad, defendant and appellee, that being the amount alleged to be remaining unpaid on the contract for completion of the plant. Plaintiff obtained a verdict and judgment thereon for $3,689.70, but, being dissatisfied with the amount of recovery, brought the case here for review.

The petition, in substance, alleges that Hershey S. Welch, a constructing engineer, was employed by the city to supervise the work; that the constructing engineer made a report and a final estimate showing the amount due from defendant. The answer denies generally the unadmitted allegations of the petition; admits that Hershey S. Welch was the engineer employed by defendant to prepare the plans and specifications, but denies that he was the supervising engineer in charge of the work, or that he had control thereof; admits that Welch was employed by the city to make estimates of amounts due plaintiff as the work progressed; alleges that the ditches for the water mains were not dug the depth required by the contract, and alleges defective covering thereof.

Plaintiff's reply denied generally all of the new matter in the answer, and denied specifically any obligation to reimburse defendant for its counterclaims.

The issues are simplified from the fact that defendant in its brief concedes that "the city is not claiming damages for defective construction of the plant. The city concedes that the plant was constructed in all respects as required by the contract, and there is not now any question between the city and the contractor on that point; and, while the plaintiff herein continually mentions damages in his brief, a critical examination of the answer in this case will not show any amount claimed as damages, but the only amounts claimed are reductions for work not done and performed by the plaintiff."

It is pointed out by plaintiff that the contract does not provide for the deductions from the contract price for which the city contends. The contract makes no reference whatever to such deductions. The contract is not ambiguous. Its terms are clearly expressed. It does not contain an obscure sentence. In such case it is the duty of the court to discover the intention of the parties from the language of the contract. It is no part of the province of the court to put a strained construction on the instrument in suit, nor to impose upon the parties a different contract than that entered into by them. In any event the interpretation placed on the contract by the parties should govern.

To support its contention the defendant argues that Hershey S. Welch was not the duly authorized supervising engineer to oversee and to pass upon the work performed by the plaintiff company. Plaintiff offered in evidence, without objection, the contract of employment between the defendant city and Hershey S. Welch that had to do with his services as engineer. It is therein shown that Engineer Welch not only prepared the "plans and specifications and detail drawings" for the plant, but that he was employed by the city to supervise and to oversee the "work and the inspection of the material used therein during the time said water-works system is being constructed by the contractor." This employment contract may properly be considered in connection with the record, and, all taken together, it is fairly disclosed that Hershey S. Welch was employed by the city and was actively engaged as its supervising engineer. The defendant city paid to the plaintiff many thousands of dollars upon estimates furnished by Engineer Welch. Not a payment was made that did not have his approval. The contract between the plaintiff company and the defendant city provides that payment for material and work "is to be made on estimates furnished by the engineer under the plans and specifications which are made a part of this contract." In view of the contract and of the record generally, the city can scarcely be heard to deny the employment and active service of Mr. Welch as

supervising engineer with full authority to bind the city in the premises. A proper construction of the contract makes the certificates of the engineer conclusive of the quality, the material furnished, and of the work performed. *Malone v. City of Philadelphia,* 12 Phila. (Pa.) 270. It also appears from the record that on October 14, 1910, Councilmen Hart, Fochtman, Hess and Wallace were appointed a committee to look after details of the plant, and of these members Councilman Hart was the chairman. It was his duty, as the record shows, "to look after the work of the water-works system," and the record elsewhere discloses that he was fairly active in the performance of the civic duty that was committed to his charge.

On July 26, 1911, engineer Welch prepared and presented to the mayor and city council his "report" wherein he recommended an acceptance of the water-works system, and his "final estimate" wherein he certified $6,956.11 as the "balance due contractor." Below his signature appeared some credits claimed by the city, which cannot be considered because he testified that they were placed there at the instance of some person connected with the city government, and that it was done without his approval. It was therefore no part of the estimate of the engineer. It may be noted that the deductions so appearing below his signature aggregate $1,860, and of this sum $1,650 is a claim for damages, contemplated in the contract, for 165 days' delay at $10 a day beyond the time agreed upon for the completion of the plant. The trial court properly withdrew this claim from the consideration of the jury because no testimony was offered to prove any damages for such delay. It will not be considered by us because defendant's brief contends only for deductions for work not done and performed. The remaining items aggregated only $210, but they cannot properly be considered as a part of the engineer's final estimate, for the reasons already given.

Sheffield & Birmingham Coal, Iron & R. Co. v. Gordon, 151 U. S. 285, holds: "When a contract provides that work done under it shall be examined by a superintendent every two weeks, and if done to his satisfaction it shall be a final acceptance by the other party, so far as done, the acceptance by the superintendent forecloses that party from thereafter claiming that the contract had not been performed according to its terms."

Omaha v. Hammond, 94 U. S. 98, holds: "Where a contract, entered into by a city for the construction of certain public works, provides that they shall be completed under the supervision and to the satisfaction of an officer of the city, his action, in finally accepting them, is an announcement of his decision that the terms of the contract have been complied with, and is binding upon the city."

The record before us utterly fails to sustain the defendant's argument in support of its claim "for reductions for work not done and performed." The specifications, which it is agreed are a part of the contract, provide that "the decision of the engineer will be final relative to the materials furnished;" and that the engine and the machinery and the pump fixtures "will be subject to the inspection and approval of the engineer in charge." It is also specified that "all pipes, specials, valves, and hydrants will be located as directed by the engineer," and that "the trenches shall be dug and pipes laid according to the grades and lines given by the engineer." And the contract finally provides that "the final estimate, including the 20 per cent retained from monthly estimates, will be paid in cash upon the completion of the work according to contract, providing it has been approved and accepted by the city council or their engineer." *National Water-Works Co. v. Kansas City,* 62 Fed. 853, 866, 27 L. R. A. 827, 838; *Mercer v. Harris,* 4 Neb. 77; *School District v. Randall,* 5 Neb. 408; Wait, Engineering & Architectural Jurisprudence, secs. 429, 430, 446, 485.

Fraud has not been alleged nor proved. There is no charge nor proof of collusion between plaintiff and any officer or employee of the defendant. The city chose and employed the engineer. The plaintiff acquiesced in its choice. The engineer was thereby constituted sole arbiter as between the parties. The work was approved by the engineer as the contract provided. He recommended an acceptance of the plant in his report, and in pursuance thereof and of his final estimate a warrant should have been drawn in payment of plaintiff's claim. Defendant contends that it was the province of the city authorities, and not that of the engineer, to inspect and approve the work before acceptance and final payment. It is sufficient answer to point out: First, that the contract expressly provides that the plant may be "approved and accepted by the city council or the engineer;" and, second, that the duly authorized authorities of the city took possession of the water-works plant and used it continuously without complaint for more than three years before this suit was commenced. Defendant thereby acted upon and ratified the acceptance of the engineer. It may properly be added that without proof it will not be presumed that the city officials failed to respond to the full measure of the official duty that was imposed upon them, and that before they took possession of the water-works system it was duly approved by them as well as by the engineer. The record before us bears convincing proof that the plant had the approval both of the council and of the engineer. In the absence of fraud or of mistake, such complete appropriation by defendant's officers of the water-works system in suit and its continuous and uninterrupted use for so many years estop defendant from denying its liability under the contract.

The court is unable to discover any reason anywhere in the voluminous record why the defendant city should not, after the lapse of so many years, pay the plaintiff for the water-works system that "was constructed in all respects as required by the contract," as the defendant's brief com-

mendably concedes. The present case falls far short of the rule that in a proper case permits the impeachment of an estimate, report or certificate on the ground of fraud, or of such gross mistake as that bad faith would be implied. *Martinsburg & Potomac R. Co. v. March,* 114 U. S. 549.

In view of the record before us and of the authorities applicable thereto, the motion of plaintiff for a directed verdict should have been sustained and judgment entered for plaintiff in the sum of $6,956.11.

The judgment of the district court is reversed, with directions to enter judgment for plaintiff in conformity with the views expressed in this opinion.

REVERSED.

SEDGWICK, J., concurs in the conclusion.

HAMER, J., dissents.

O. IHNEN, JR., APPELLANT, V. SOUTH OMAHA LIVE STOCK EXCHANGE ET AL., APPELLEES.

FILED APRIL 14, 1917. No. 19357.

Voluntary Associations: MEMBERSHIP: DISCIPLINE. One who assumes membership in an unincorporated voluntary association or exchange, organized not for pecuniary gain or profit, but to provide convenient facilities for the orderly conduct of business at the common expense, such association having adopted for its government reasonable and uniform rules that do not contravene the law of the land nor offend against public policy, thereby consents to such rules, and, in event of violation thereof, is subject to such reasonable discipline as they may provide.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Lambert, Shotwell & Shotwell, for appellant.

Brown, Baxter & Van Dusen, contra.

DEAN, J.

The plaintiff is a member of the South Omaha Live Stock Exchange. He is a dealer in live stock, and does business in the name of the "Farmer's Live Stock Commission Company," of which he is the sole owner. The defendant exchange is a voluntary association of persons not incorporated, organized to establish and maintain a commercial exchange, but not for pecuniary gain or profit.

For its government the defendant has a code consisting of many rules, regulations and by-laws. The control of the defendant association is committed by its rules to a board of nine directors, a president and a vice-president. Defendant filed a complaint with the board of directors against plaintiff charging him with the violation of rule No. 2 and rule No. 27 of the exchange.

Rule No. 2 follows: "The objects of this association are: To establish and maintain a commercial exchange, not for pecuniary gain or profit, but to promote and protect all interests concerned in the purchase and sale of live stock at the South Omaha stock-yards; to promote uniformity in the customs and usages at said market; to inculcate and enforce correct and high moral principles in the transaction of business; to inspire confidence in the methods and integrity of its members; to provide facilities for the orderly and prompt conduct of business; to facilitate the speedy and equitable adjustment of disputes, and, generally, to promote the welfare of the South Omaha market."

The complaint contained two counts. It will not be necessary to consider the first count, for the reason that it involves rule 27, and that rule is not before us. The second count, charging a violation of rule 2, follows: "(2) Said O. Ihnen, Jr., is guilty of violating rule No. 2 of said exchange in the following particular: That he, the said O. Ihnen, Jr., knew at the time he employed said * * * on or about the 28th day of August, 1914, that the said * * * was guilty of the several offenses charged against him in violating section 16 of rule No. 13 and section 7 of

rule 11 of said exchange, and knew of his trial on said charges, and knew of his plea of guilty thereto, and knew of his expulsion from said membership in said exchange and that in the face of said knowledge, and notwithstanding the expulsion of said * * * for the numerous offenses charged against him, the said O. Ihnen, Jr., in violation of rule No. 2 and in violation of his obligation as a member of said exchange to protect its good name and to promote the purpose for which said exchange was formed namely, to promote and protect all interests concerned in the purchase and sale of live stock in South Omaha, Nebraska, and to inculcate and enforce correct high moral principles in the transaction of business, and to inspire confidence in the methods and integrity of its members and, generally, to promote the welfare of the South Omaha market, employed and still employs said * * * to assist him, the said Ihnen, in carrying on his live stock commission business in South Omaha, Nebraska."

Section 7 of rule No. 11 that is referred to in the foregoing complaint against plaintiff follows: "When any member of the association shall violate any of the rules, regulations or by-laws of the association, be guilty of any act of bad faith, or dishonest conduct, he shall be censured, fined, suspended, or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed. A majority of a quorum sitting at a regular or adjourned meeting of the board of directors shall be necessary to censure, fine, or suspend, and an affirmative vote of at least six members of the board of directors shall be necessary to expel."

A notice was served on plaintiff to appear for hearing on a day therein named at the office of A. F. Stryker, secretary traffic manager of the exhange. Shortly thereafter, and before the day fixed in the notice, this action was begun by plaintiff in the district court for Douglas county to enjoin the defendant exchange and its officers from proceeding with the hearing.

The petition alleges generally that the membership of plaintiff, now of eight years' duration, is of great pecuniary value; that he is under a contractual obligation for one year to pay $150 a month to the former member of the exchange who is now in his employ, and who "was expelled from membership in defendant association, and * * * has never been reinstated to membership in said association; that the said * * * expelled member is an experienced cattle salesman, with a large and broad acquaintance with the various shippers and cattlemen shipping to the South Omaha live stock market, and that by reason thereof his services are now, and have been, and will in the future be, of peculiar and great value to plaintiff, and that a breach of said contract by plaintiff will subject him to great and irreparable damage and injury." The petition charges that rule 2 is merely "a recital of the alleged objects and purposes" of the association, and that "no penalty is provided by the rules and by-laws" for its violation. The plaintiff further alleges "that, unless enjoined, the defendants will proceed to try and convict" him, and that he will be heavily fined or expelled from membership. Defendant demurred to plaintiff's petition, alleging that it "fails to state facts sufficient to constitute a cause of action against them, or either of them." The court allowed a temporary order of injunction, and enjoined the defendant exchange, until its further order, from "trying, or attempting to try, * * * or taking any action against the plaintiff * * * for the alleged violation of rules 2 and 27." Defendant moved a dissolution of the temporary injunction, for the reason stated in the demurrer, and because the "petition is without equity," and because "the court is without jurisdiction to enjoin the defendant as prayed in the petition." On submission to the court on the foregoing pleadings and motion of defendant and the rules and by-laws of the defendant exchange, the temporary injunction as to the alleged violation by the plaintiff of rules 14 and 27 was made perpetual. The in-

junction was dissolved as to rule 2, and to this ruling plaintiff excepted.

Plaintiff in his brief charges that "the whole controversy started over the employment" by plaintiff of a cattle salesman, who "had been expelled from membership in the exchange." He concedes that defendant demanded of him the discharge of the ex-member, who was in his employ before the charges were filed. Plaintiff argues that, inasmuch as his sole business and livelihood is derived from his connection with the exchange, in which he "has a membership which is of the value of $3,000," he "would suffer irreparable injury from expulsion." It is argued that no member of the defendant association can be expelled for a violation of rule 2, because that rule is merely a preamble and statement of the objects and purposes of the organization, and does not state any penalty for its violation.

A member of an unincorporated association may be expelled "for such conduct as clearly violates the fundamental objects of the association." *Otto v. Journeymen Tailors Protective & Benevolent Union,* 75 Cal. 308, 7 Am. St. Rep. 156. Under this rule plaintiff's employee, the former member, was expelled for 27 specified violations of the fundamental objects of the association, to which he pleaded guilty. Thereupon the plaintiff, who was a member of the defendant association, employed the expelled member, and thereby placed him in the same position with reference to opportunities to violate the fundamental objects of the association. This conduct of the plaintiff might have a tendency to overrule and reverse the decision of the association in its action that resulted in expelling from membership the plaintiff's employee, and the result might be that one who was expelled would thus be allowed in the name of the plaintiff to do those acts for which he had been expelled.

The authorities do not support plaintiff's contention that he cannot properly be subjected to a trial in the premises. Plaintiff voluntarily assumed his membership in the association, and he thereby consented to its rules and sub-

jected himself to its tribunal. No rule is better settled than this. The case of *Green v. Board of Trade,* 174 Ill. 585, holds: "Courts will not interfere to control the enforcement of reasonable by-laws which infringe no rule of law or public policy, but will leave such enforcement to the corporation in the manner they have adopted for their own government and discipline."

The rule is well stated in *Leech v. Harris,* 2 Brewst. (Pa.) 571, wherein it is held: "If a complaint made against a member of a board is within and according to the regulations of the association, the person charged must submit to the forum and tribunal to whose jurisdiction he assented when he became a member of the board, and this court can give him no relief, except in case of irregularity of the proceedings against him." *Ryan v. Lamson,* 44 Ill. App. 204; *Board of Trade v. Weare,* 105 Ill. App. 289; *Jackson v. South Omaha Live Stock Exchange,* 49 Neb. 687; 26 Am. & Eng. Ency. of Law, 796; 17 Cyc. 860; 10 R. C. L. 1192.

The question of the guilt or the innocence of the plaintiff of the charges preferred against him by the exchange is not presented to us in the record. The question before us is with respect to the right of defendant to prefer charges against plaintiff and to put him on trial in pursuance of the provisions of valid rules that are in all respects reasonable, and that are not against public policy, and that do not contravene the law of the land. We hold that the exchange is clothed with the right so to do, and we will not assume without proof that a fair and impartial hearing will not be accorded plaintiff.

The judgment of the district court is right, and is in all things

AFFIRMED.

ROSE, J., not sitting.

HOMER G. STAPLETON, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MAY 5, 1917. No. 19280.

1. **Witnesses:** PRIVILEGED COMMUNICATIONS: PHYSCIANS. When a party submits to an examination, or inspection, by a physician, for the purpose of learning the state of his health or the physical condition of any part of his anatomy, the knowledge thus acquired by the physician is privileged, and, under section 7898, Rev. St. 1913, the physician is not permitted to testify to the condition he found, over objection based upon the statute.
2. ———: ———: ———. When plaintiff has permitted a physician to make a radiograph of his injured foot for the purpose of ascertaining the extent and character of his injuries, the radiograph so made is not admissible in evidence over objection of plaintiff based upon the statute.
3. **Master and Servant:** INJURY TO SERVANT: INTERSTATE COMMERCE. The evidence, set out in the opinion, *held* insufficient to show that the locomotives being moved when plaintiff received his injuries were instruments of interstate commerce.
4. **Damages:** REMITTITUR. The evidence of plaintiff's life expectancy and earning capacity and the extent of his injuries, set out in the opinion, and a verdict of $17,500 *held* so excessive as to require a remittitur of $5,500.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed on condition.*

Byron Clark, Jesse L. Root and *J. W. Weingarten,* for appellant.

Benjamin S. Baker and *E. A. Conaway, contra.*

MORRISSEY, C. J.

Plaintiff recovered judgment for personal injuries received while in the employ of defendant. Defendant has made an unusual number of assignments of error, but they all fall within three or four general groups. The injury was received May 9, 1914, while plaintiff was engaged in switching 2 dead engines and 2 shop cars in the yards at Havelock, Nebraska, and is alleged to have been received

in the following manner: The switch engine was moving in an easterly direction, and plaintiff was riding on an iron step on the south side of one of the dead engines, the step being attached to the pilot beam of the engine, and being about a foot in length and eight inches in width. He was standing on this step and holding on to the handrail with both hands, when the step struck a cross-tie which had been left in too close proximity to the track. This tie, together with a great many others, had been thrown off along the right of way by a different crew and was intended for use in repairing the track. It is claimed that the impact of the step against the tie knocked plaintiff's feet from the step; that his right ankle was struck and injured in such a manner as to destroy the normal use of his foot and leg, and that he is permanently disabled.

Defendant admitted the allegation as to employment, and that while in such employment plaintiff's ankle came in contact with the tie or some other substance, denied all other allegations of the petition, and alleged that plaintiff was an experienced switchman, knew the condition of the track and premises, and that whatever injury he received arose out of the hazard which he assumed by virtue of his employment, and that his injuries were caused by his own negligence and carelessness. During the trial a shoe which plaintiff wore on his right foot at the time of the injury was offered in evidence. This shoe showed an abrasion of the leather, and on cross-examination defendant's counsel asked the witness several questions in regard to the shoe, and as to the time when he concluded to preserve it as evidence. On redirect examination plaintiff testified that he concluded to preserve the shoe about the time defendant offered to pay him $750 in settlement. Timely objection to this testimony was made, but overruled. Subsequently the court struck out this testimony, and instructed the jury that the testimony was withdrawn from the record, and that they should not consider it or give it any consideration. Defendant says the action of the court in withdrawing the testimony and giving this instruction to the

jury did not correct the error in admitting the testimony, and also that by striking it out he denied defendant the opportunity to cross-examine in relation thereto. The testimony was improperly admitted, but, in view of the admissions in defendant's answer that plaintiff received injuries while in its employment, we cannot see that a mere offer of settlement would seriously prejudice defendant before the jury, even though the evidence had not been stricken out. The court having withdrawn the evidence and instructed the jury to disregard it, the error is not so prejudicial as to require a reversal.

Dr. Wilson, a witness for plaintiff, testified that in examining plaintiff's limb he found an area of anesthesia; "he has no feeling on the inner side extending up to within about four inches below the knee; and he has no feeling in the back part of his leg extending up to about the half of the calf of the leg; that the reflexes, the knee jerk, is absolutely minus in that leg; * * * it indicated the absence of the proper condition of the nerve of the right leg. It also showed that the Babinski reflex was minus. * * * By scratching the bottom of the foot the great toe is in dorsal flexion. This is minus also. * * * I made a test of his pupillary reaction, of his eyes, and of the Romberg's sign, showing a condition that we always try to find out in case there is any nerve trouble, and in measuring the foot I find the measurements of the leg on that side are three-quarters of an inch smaller than on the other. Q. At what point? A. At the calf is three-quarters and at the ankle is three-eights. Q. What does that indicate, Doctor? A. It indicates an atrophy of the muscle or a malnutrition."

Presumably to contradict this testimony, defendant called as witnesses several doctors, all but one or two of whom were in its regular employ, to whom plaintiff had submitted his leg for inspection and examination. This testimony was objected to on the ground that it falls within the prohibition contained in section 7898, Rev. St. 1913, providing: "No practicing * * * physician * * *

or surgeon * * * shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office." The objections were sustained, and the greater part of defendant's brief is given up to an effort to show that this evidence was admissible. In this connection several propositions are laid down: First, it is said that when a party asks to exclude evidence under this section of the statute he must make it appear that the physician acquired his knowledge while attending the patient in his professional capacity. This meaning may be fairly inferred from the section itself. Immediately after the injury plaintiff consulted defendant's local physician, Dr. Ballard. Later he called on other physicians of the company, Drs. Hollenbeck and Wenger, and he had testified as to measurements they had made of the leg, and the court permitted these physicians to testify as to the measurements because testimony on that subject had been offered by plaintiff, but their testimony on all other branches of the case was excluded, although defendant offered to prove by these physicians that their examination was not for the purpose of treatment. Two of the physicians made X-ray examinations, but none of the physicians whose testimony was excluded prescribed for the plaintiff. Dr. Buchanan testified that plaintiff called at his office in the summer of 1914, and he made a radiograph of plaintiff's foot and ankle. Defendant offered these plates in evidence, but they were excluded. Dr. Hollenbeck testified that plaintiff called at his office August 27, 1914, and once or twice afterwards; that he was not there for treatment, but was there for the purpose of having an examination made to ascertain the condition of his foot. Dr. Wenger testified that plaintiff called at his office in September, 1914; that he was not there for the purpose of treatment. "He was there for examination, * * * for a physical examination." Dr. Young met plaintiff in Dr. Hull's office in August, and made an examination of him "to ascer-

tain the state of his health at that time, his physical condition, * * * with particular reference to his right ankle and limb." Dr. Hull testified as to the examination at which Dr. Young was present, and said the purpose was to determine his physical condition. Dr. Tyler, another X-ray specialist, said plaintiff called on him "for an X-ray examination of the foot, * * * to find out the condition of the bones in the foot." He further testified that he was sent to him by Dr. Hull, and later stated that he was employed by the defendant. We cannot escape the conclusion that as to each of these witnesses the relation of physician and patient existed. It was because of their professional training that plaintiff submitted his leg for inspection and examination. The statute cannot be given a strained construction, but must be taken in its plain and ordinary sense. When it says that a physician shall not be allowed to give testimony or to disclose confidential communications properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office, it means to exclude the disclosure of any information that comes to such physician by reason of the professional capacity in which he acts. It does not matter whether the patient seeks a prescription for a disordered stomach or a radiograph of an injured foot. Nor does the statute make any distinction between a regularly retained physician of a railroad company, who is paid for his services by the railroad company, and a physician paid by the patient.

In *Battis v. Chicago, R. I. & P. R. Co.*, 124 Ia., 623, the court had under consideration a question somewhat analagous to that which we are discussing. The statute of Iowa is very similar to ours. The station agent called the local surgeon for the railroad company to attend plaintiff who had received an injury. It was claimed by the railroad company that the physician was its employee, was acting for it, and that the physician was in no sense the physician of plaintiff. The court said: "The allegiance of the physician must be wholly upon one side or the other.

It matters not, in this connection, who calls him in the first instance, or who pays him."

The same rule which would exclude the oral testimony of the doctor would exclude the radiographs of plaintiff's foot. Its introduction in evidence would be a disclosure of a confidential communication.

In *Sovereign Camp, W. O. W., v. Grandon,* 64 Neb. 39, in discussing the statute at page 46, this court said: "The rule in this state, as well as in other states having a like statute, is that the above sections protect a party against any disclosure by a physician made to him in the course of his professional employment, and necessary and proper to enable him to discharge his duty to his patient. Not only are such communications privileged, but whatever knowledge the physician may gain from observing his condition and symptoms is likewise privileged. There can be no doubt as to the rights of the patient in this respect, and the courts, in a proper case, are vigilant to see that these rights are fully protected."

"Information acquired by the physician by looking at the patient or by examination is as much within the statutes as are the verbal communications which take place between them." *Smart v. Kansas City,* 208 Mo. 162, 197.

Defendant complains because on cross-examination it was not permitted to inquire whether plaintiff had submitted himself for examination to specialists for the purpose of qualifying them as witnesses, and that he did not intend to produce these witnesses upon the trial. This line of examination was not pertinent to anything developed in the examination of the witness in chief. He had the right to select his own physicians and his own witnesses. If counsel for defendant disbelieved the testimony of Dr. Wilson, who testified as to the character and extent of plaintiff's injuries, he might have procured the testimony of men eminent as physicians and surgeons by application to the court for the appointment of a commission to make an examination of the person of the plaintiff. *State v. Troup,* 98 Neb. 333.

One paragraph of instruction No. 3, defining negligence, is singled out and criticized. It is a familiar rule that the instructions must be construed together. This rule must be applied to instruction No. 3, and when so applied the instruction correctly states the law.

Defendant further complains because the court refused to submit the defense of assumption of risk, which it contends is applicable to this case under the federal employers' liability act. Was there sufficient proof to warrant the court in submitting this defense? Plaintiff alleges in his petition that defendant operates a line of railroad "in and through the states of Iowa, Nebraska, Kansas, Colorado, and Wyoming, over which is carried passengers and freight for hire as a common carrier to and over points on its said railroad." This allegation is admitted in the answer of defendant, but the answer makes no reference whatever to interstate traffic. The accident occurred in defendant's yards at Havelock, Nebraska. The only testimony cited by defendant to sustain its contention that the engines being moved were engaged in interstate commerce was elicited on the cross-examination of the plaintiff: "Q. Were the cars next to the switch engine? A. They were. Q. And then came the two dead engines? A. Yes, sir. Q. They were both of the same class, were they not? A. Yes, sir. Q. What were they, 0-2? A. 0-2, or 0-1, I don't remember now. Q. That is the largest class of freight engines used on the Burlington? A. I think so, at that time. Q. Since then they have put out the M-1? A. I think so. Q. But before your accident they were the largest class of locomotives in use by the Burlington on the lines west of the river? A. No. Q. Unless it would be the Mallet? A. The Mallets were larger; yes, sir. * * * Q. And they are used exclusively for hauling through freight trains? A. Yes, sir. Q. Had these dead engines, before the accident, been in use by the Burlington? A. Yes, sir. Q. On the lines west? A. The lines east. Q. And had been brought to Havelock for repair? A. Yes, sir. Q. After they were overhauled and

repaired, then do they go back in the same service? A. I think so."

This testimony shows that the engines had been used for hauling through freight trains, but we are not informed as to what is meant by the term "through freight train." There is no suggestion that these engines crossed a state line or that they hauled freight that crossed a state line. If we are left to speculate as to the character of a through freight train, we might suppose that it is a train running from one division point to another division point without stopping to pick up or to unload local freight. There are a number of division points on defendant's lines within the state of Nebraska. To say they are in use on "the lines east of the river" or "the lines west of the river" is equally indefinite. The Burlington railroad crosses the Platte river at Ashland, a few miles east of Havelock, and this statement might as well apply to engines in use east of the Platte river or west of the Platte river as to apply to some river flowing between two states. If these engines had, in fact, been used in interstate commerce, defendant might easily have so shown, and it was its duty to do so. There being a failure of such proof, the court properly withdrew the defense of assumption of risk from the jury. But he not only withdrew that defense, but told the jury that, "by an express provision of the statutes of the state of Nebraska, the plaintiff in such case cannot be held to have assumed any of the risks of his employment; and, therefore, should you find from the evidence, as heretofore stated, that the defendant or its servants was guilty of negligence as charged, and that the same was the proximate cause of plaintiff's injury, then you should find that plaintiff did not assume the risk of his employment arising from such negligence."

It is said in defendant's brief that this instruction not only deprived defendant of that defense, but that "its plain purport is that defendant had interposed a defense declared unlawful by the legislature of Nebraska," and that the effect of this is to prejudice defendant's cause in

the minds of the jury. Perhaps a discussion was unnecessary, but we cannot see that it would have any prejudicial effect, and, if error it is, it is error without prejudice. *Carlon v. City Savings Bank,* 85 Neb. 659.

It is not possible within the limits of this opinion to discuss separately all of the assignments made, but those not discussed have been considered. The verdict and judgment was for $17,500. Neither counsel has seen fit to favor us with any suggestion as to what would be a fair recovery under the circumstances, although counsel for defendant refers to this verdict as "monstrous and out of proportion to any possible injury inflicted." At the time of the injury plaintiff was 37 years of age. He had a life expectancy of 29 years, and was earning from $100 to $125 a month as a switchman. He is not educated in any of the professions, but has throughout his life been engaged in hard manual labor. The nature of plaintiff's injury is such as will necessarily prevent him from continuing in his usual occupation and will greatly lessen his capacity for earning money. What he may earn in his crippled condition is hard to estimate, still it is clear that he is not wholly incapacitated. There is but meager proof of pain and suffering, compensation for which is always difficult to measure. Though his foot is crippled, plaintiff is not entirely deprived of its use. Serious as his injuries are, they are not such as to sustain the verdict for the full amount, and we are constrained to hold that the verdict is excessive, and that plaintiff should be required to remit all in excess of $12,000. If plaintiff files such remittitur within 20 days, the judgment as thus reduced is affirmed; otherwise it will stand reversed, and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

SEDGWICK, J., not sitting.

CENTRAL STATE BANK ET AL., APPELLEES, V. FARMERS STATE BANK ET AL., APPELLANTS.

FILED MAY 5, 1917. No. 19984.

Banks and Banking: "DEPOSIT:" FAILURE TO PAY: GUARANTY FUND. When a party, in good faith, and in the usual course of business, places money in a state bank under an agreement that the account shall be subject to check and shall draw interest at a rate not exceeding that fixed by statute, it becomes a deposit under the provisions of sections 280-356, Rev. St. 1913, and, in case the bank fails to pay on demand, it may be made a charge against the depositors' guaranty fund.

APPEAL from the district court for Burt county: GEORGE A. DAY, JUDGE. *Affirmed.*

Willis E. Reed, Attorney General, and *Dexter T. Barrett,* for appellants.

Lambert, Shotwell & Shotwell, contra.

MORRISSEY, C. J.

This is an appeal from an order of the district court for Burt county allowing the claim of plaintiff against the defendant, who is the receiver of the Farmers State Bank of Decatur. Albert S. White, who was in active charge of the organization work of a proposed banking corporation, called the Central State Bank, made three deposits in the Decatur bank, aggregating $8,000. May 2, 1916, after the completion of the organization of the proposed Central State Bank, White drew his check against the deposits for the full amount thereof, less the accrued interest, and it was redeposited in the name of the real owner of the account, the Central State Bank. This deposit was made on the same terms as the original deposit. Four days thereafter the state banking board took possession of all of the assets of the Farmers State Bank of Decatur, and subsequently a receiver was duly appointed.

The plaintiff herein filed its petition for the allowance of its claim in the principal sum of $8,000. White, as secretary, filed a claim in the sum of $45.77 for the interest accrued while the deposit stood in his name as secretary. The attorney general filed objections to the allowance of the claims, alleging that the money was not deposited in the usual course of business, nor entitled to the protection of the depositors' guaranty fund. The evidence shows that the deposit was made for an indefinite period, with the agreement between White and the bank that it should draw interest at the rate of 5 per cent. White was receiving subscriptions from numerous parties to the capital stock of the Central State Bank. He testified that he made similar deposits in other banks, intending to withdraw the money when the new bank should be chartered and be ready for business. He admits that he learned from the cashier of the failed bank that the bank was in need of money, as its deposits were decreasing, and he did not want it to become embarrassed, but that that was a minor reason, that he would not have made the deposit if he had not known it was protected by the depositors' guaranty fund. There is no contradiction of this. The account was subject to check; it might have been drawn out any day without notice; and the interest agreed upon was within the limit fixed by statute. Neither White nor any other person acting for plaintiff was a stockholder of, or officer in, the Decatur bank. The transaction appears to be free from fraud, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

EDWARD L. SIMON, APPELLANT, V. H. J. CATHROE COMPANY ET AL., APPLLEES.

FILED MAY 5, 1917. No. 20016.

1. **Master and Servant: EMPLOYERS' LIABILITY ACT: LIMITATIONS.** Sections 3674, 3679, Rev. St. 1913 (Employers' Liability Act) should

be construed together, and the limit of six months for making a claim for compensation and of one year for agreeing upon the compensation, or for filing of the petition, does not begin to run until six months after the removal of physical or mental incapacity.

2. ———: ———: FILING PETITION. Evidence examined, and *held* to sustain the finding of the district court that the plaintiff was physically incapacitated from the time of the accident until the time of the trial.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed as modified.*

R. J. Greene, for appellant.

Mahoney & Kennedy, Strode & Beghtol and *Guy C. Kiddoo, contra.*

LETTON, J.

Action under employers' liability act, sections 3642-3696, Rev. St. 1913. H. J. Cathroe Company was the employer and the London Guaranty & Accident Company are insurers of its liability.

On January 15, 1915, plaintiff was a bricklayer engaged in laying brick in the lower portion of a stormwater sewer. A workman whose duty it was to lower brick in an iron basket managed the same so negligently that a brick or the corner of the basket struck the plaintiff on the head, causing a wound from which he bled quite freely, and was obliged to stop working. The wound healed in a week or two, but plaintiff was not able to return to the job, although he afterwards worked for about a week for other parties. A few months afterwards he began to act peculiarly, complained of severe pains in his head, was unable to sleep, assaulted a married son with whom he he had previously been upon good terms, threatened to kill himself and his children, and in other manners manifested a deranged intellect. He consulted a physician and surgeon in April or May of the year following the accident, who told him that he might have a clot of blood upon the brain. He was afterwards, on the complaint of his

son, found to be insane by an insanity commission, and confined in the state hospital for the insane at Lincoln. About September 1, 1916, his skull was trephined and a portion of the cranium about three inches square removed, when a blood clot was found on the brain about the size of an olive. This was removed by the surgeon. Plaintiff recovered from the operation, except for a slight paralysis from which he had not fully recovered at the time of the trial, and which the surgeon testified might continue for a year thereafter or more. It seems clear that the injury caused an effusion of blood which affected to a greater or less extent the plaintiff's mental faculties, and, while he only displayed a tendency to violence occasionally, he suffered from nervousness and sleeplessness and lack of co-ordination of ideas to a greater or less extent until the removal of the blood clot. The cause was tried to the court, which found generally in favor of the plaintiff against the defendant Cathroe Company, that plaintiff was mentally incompetent after the accident until about the 12th day of September, 1916, when he was discharged from the state hospital for the insane at Lincoln; that up to the present time his disability has been total, but that he is recovering, and that it is impossible to determine beyond six months the length of time during which he will be partially disabled; that the occupation of such petitioner was seasonal; and that the plaintiff ought to recover from the defendant Cathroe Company for a total disability for a period of 72 weeks at $10 a week in the gross sum of $720, and for partial disability at $5 a week for six months in the future. No allowance was made for medical or hospital services. The case against the London Guaranty & Accident Company was dismissed.

Plaintiff complains of the refusal to allow reasonable medical and hospital expenses, and of the findings that the occupation of plaintiff was seasonal, and that the disability of plaintiff would continue only for six months following the trial. As to the first point: The allowance was evidently refused because no medical expenses were incurred

"during the first twenty-one days after disability begins." Section 3661. Even if we should consider that the disability for which medical aid was needed did not begin until the trouble was diagnosed as a blood clot, it was about six months afterwards before the aid of the surgeon was again sought and the operation performed. The disability, except for two weeks that he was able to work, extended to the time of the trial, which took place 102 weeks after the injury, and hence the recovery should have been for 100 weeks at $10 a week, or $1,000. Even if the occupation is seasonal, as the court held, the statute would not reduce the allowance to less than $10 a week at the wages plaintiff was earning. As to the allowance for future partial disability: The surgeon testified that immediately after the operation the plaintiff suffered a slight paralysis, and that it has not entirely disappeared, but it would probably last no longer than one year after the time of the operation. Since either party has the right at any time after six months from the award to have the question re-examined under sections 3682, 3683, Rev. St. 1913, on the ground of increase or decrease of incapacity, we will not interfere with the finding of the district court as to partial disability. The judgment of the district court will be modified in accordance with these findings.

As to the cross-appeal: In addition to denials, the answers plead that the parties had not agreed upon compensation within one year after the accident, and that the plaintiff did not file his petition to recover compensation within said time; that his claim for compensation was not made within six months after the occurrence of the injury, and he was not suffering from any physical or mental incapacity during such time which would excuse his failure; that no medical and hospital services were needed during the first 21 days of his alleged disability, and no claim was made for the same upon the Cathroe Company. Section 3679, Rev. St. 1913, provides: "That all claims for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the

compensation payable under this article, or unless, within one year after the accident one of the parties shall have filed a petition as provided in the next following section hereof." Section 3680 provides and regulates the procedure in actions under the statute. Section 3674 provides: "No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same, or in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity." It is also provided that "want of such written notice shall not be a bar to proceedings under this article, if it be shown that the employer had notice or knowledge of the injury."

We are of opinion that section 3674 and section 3679 should be construed together, and that as to the limit in section 3679 of one year the period must be construed as in section 3674, so that the time begins to run after the removal of such physical or mental incapacity.

The accident occurred on January 15, 1915. The petition was filed November 1, 1916. The first claim for compensation was made September 26, 1916, which was a few days after the plaintiff was discharged from the insane hospital, but it was shown that both defendants had notice and knowledge of the accident a few days after it occurred. If plaintiff was physically and mentally incapacitated until discharged, as found by the district court, the claim was filed in ample time.

The cross-appellant contends that this finding is not supported by the evidence. It is shown that in 1913 plaintiff had been confined in the hospital as a dipsomaniac, but that he had not indulged in liquor again until after the accident and there is no proof of excessive use of intoxicants since that time. The attending physician at the

hospital gave the result of his physical and mental examination of plaintiff and testified that in his opinion he was not insane, but he was not informed of the existence of the blood clot, nor did he testify that plaintiff had not been mentally incapacitated after the accident. We are unable to determine from the evidence at just what period before the six months after the accident expired the mental incapacity of the plaintiff developed, but when the whole testimony on this point is considered the finding that his mind was affected before the expiration of the time and that not until after the operation did his faculties clear is supported by the evidence. The injury seemed slight at the time and the existence of the blood clot was not suspected or known until he had visited the surgeon. The rule announced in *Johansen v. Union Stock Yards Co.*, 99 Neb. 328, is that in a case of an injury which at first seems slight but afterwards develops graver symptoms, the injury occurs when the diseased condition culminates. The finding of the district court that the claim was filed in time is supported by sufficient evidence.

The judgment of the district court is modified so that plaintiff shall recover the sum of $1,000 for total disability to time of trial and $5 per week for partial disability for six months thereafter, and as so modified the judgment is

AFFIRMED.

CORNISH, J., not sitting.

FRANK RYBA, APPELLEE, V. SWIFT & COMPANY ET AL., APPELLANTS.

FILED MAY 5, 1917. Nos. 19247, 19937.

1. **Appeal: CONFLICTING EVIDENCE.** A finding of the jury upon conflicting testimony will not be set aside, if there is competent evidence to support it, unless clearly wrong.

2. Damages: REMITTITUR. A verdict in plaintiff's favor for $9,625, in a suit by a carpenter earning $2.50 a day at the age of 53 to recover damages for negligence resulting in a fracture of the femur of his left leg, *held* excessive, requiring a remittitur in the sum of $3,625 as a condition of affirmance.

APPEAL from the district court for Douglas county: CHARLES LESLIE, Judge. *Affirmed on condition.*

Gurley & Fitch, for appellants.

Weaver & Giller, contra.

ROSE, J.

This an action to recover damages in the sum of $25,000 for personal injuries sustained by plaintiff, January 12, 1914, while employed by defendant Swift & Company in the construction of an eight-story concrete building of which defendant Henry Perkins was superintendent. The building was situated in South Omaha, and was intended for packing purposes. On the seventh floor there was a long room without windows. It was lighted with kerosene lanterns. Running lengthwise in the floor there was a vent or opening two feet or more in width. On platforms over part of the vent, plaintiff had been engaged with other workmen in chipping concrete from girders. He had been directed by the foreman to get a timber, and in carrying it across the room he fell through the vent to a concrete floor below. In connection with the facts thus outlined, the conditions and conduct imputing negligence, if the petition is understood, may be summarized as follows: Under the platforms where the employees had been at work the vent was entirely covered with planks. Elsewhere over the vent boards arranged to leave interstices had been covered with a layer of paper. Plaintiff fell through the vent where there was nothing over it but paper. The room was not properly lighted. Defendants did not provide a safe place to work. Plaintiff did not know of the conditions and had not been warned of the danger. Defendants denied the negligence charged, and pleaded negligence on the part of plaintiff. From judgment on a ver-

dict in plaintiff's favor for $9,625, defendants have appealed.

It is contended that the trial court erred in refusing to direct a verdict for defendants on the ground there was no proof of actionable negligence on their part. They argue that plaintiff, a carpenter who had been at work on the building, knew the risks and dangers incident to such employment; that defendants had a right to assume he would realize existing conditions and use common sense to avoid injury; that the accident was the result of his own negligence. This argument is refuted by testimony tending to prove the appearance of safety and the concealment of danger. On the issue of notice or warning to plaintiff the evidence is conflicting. The proofs in support of the allegations of the petition seem to sustain the verdict. In this view of the evidence, there does not appear to be any prejudicial error in the ruling of the trial court.

It is also contended that the verdict is excessive. There seems to be merit in this assignment. Plaintiff was a carpenter 53 years of age, and was earning $2.50 a day when injured. His expectancy of life was about 19 years. Figuring the present worth of his earnings for the full period, the award of the jury, including suffering and other elements of damage, would be a substantial recovery for total and permanent disability. The femur of his left leg was broken just below the hip joint and he was otherwise temporarily injured. While the injured leg has been shortened, the evidence will not justify a finding that plaintiff's earning capacity as a carpenter has been permanently destroyed.

Upon the filing of a remittitur in the sum of $3,625 within 20 days, the judgment to the extent of $6,000 will be affirmed. Otherwise it will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting.

EARL A. RAWITZER ET AL., APPELLEES, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLANT.

FILED MAY 5, 1917. No. 19484.

1. **Insurance: ACTION: SUICIDE: QUESTION FOR JURY.** Where suicide is properly presented as a defense in a suit on a certificate of accident insurance to recover indemnity for the death of insured, it is error to direct a verdict for plaintiffs, if different minds may reasonably draw different conclusions from the evidence on that issue. *Walden v. Bankers Life Ass'n*, 89 Neb. 546, explained.

2. **Pleading: DEFENSES.** "A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false." *Home Fire Ins. Co. v. Decker*, 55 Neb. 346.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

Thomas Lynch, for appellant.

Byron G. Burbank, contra.

ROSE, J.

This is an action to recover $5,000 and interest on a certificate of accident insurance issued by defendant January 8, 1910, to Albert H. Rawitzer, father of plaintiffs. The certificate provided for an indemnity of $5,000 in the event that the death of insured resulted from external, violent and accidental means. While the insurance was in force insured died from carbolic acid poisoning, June 13, 1914. In the petition plaintiffs, among other things, alleged: "The said Albert H. Rawitzer was killed by carbolic acid poisoning, through external, violent and accidental means; that he swallowed enough to cause his death, and, when he took it, he did not know it was a deadly poison, as it was, but believed it to be some harmless liquid, and he took the same without any intention to injure himself, and the taking thereof was accidental." Defendant denied that insured swallowed the carbolic acid without knowing it was a deadly poison, believing it to be a harmless liquid, and

denied that he drank it without intention to injure himself. Defendant also pleaded a by-law limiting to $500 the insurance for injuries resulting from "the accidental taking of poison." The reply of plaintiffs contained a plea of estoppel based on the ground that a synopsis of the by-laws printed by defendant on the certificate of insurance made no reference to a by-law limiting to $500 the indemnity for injuries resulting from "the accidental taking of poison." Plaintiffs adduced no proof, and at the close of the testimony on behalf of defendant the trial court sustained a motion for a peremptory instruction in favor of plaintiffs. From judgment on a verdict for $5,473.45, defendant has appealed.

The first question presented here is assigned error in the order directing a verdict for plaintiffs. The reasons urged in support of the peremptory instruction may be summarized as follows: There is a presumption that insured did not intentionally take his own life. There is no evidence of a motive for self-destruction. The evidence would not sustain a finding that insured committed suicide. In this connection plaintiffs invoke the following language quoted from the syllabus in *Walden v. Bankers Life Ass'n*, 89 Neb. 546:

"The burden is upon an insurance company to prove by a preponderance of the evidence a controverted defense that the deceased came to his death from poison self-administered.

"In such a case, the defense is not established unless the evidence so clearly and unmistakably points to the conclusion of suicide as to exclude all reasonable probability of death by accident or from natural causes."

The rule announced in the latter paragraph should not be included in a charge to a jury on the issue of suicide, but it is applicable in the appellate court on review of a jury's finding that insured did not intentionally take his own life. On appeal it may properly be held that such a finding should not be overturned "unless the evidence so clearly and unmistakably points to the conclusion of

suicide as to exclude all reasonable probability of death by accident or from natural causes." This is another way of saying that the finding of a jury on an issue of fact will not be set aside on appeal as unsupported by the evidence unless clearly wrong.

In the present case a direction to the jury to return a verdict for plaintiffs is challenged as erroneous. The trial court, in ruling on the motion for a peremptory instruction, was required to consider whether the evidence would support a finding by the jury that insured committed suicide. The following rules of law are applicable to the inquiry: On an issue in a civil action a finding in favor of the insurer does not require more than a preponderance of the evidence. *Walden v. Bankers Life Ass'n,* 89 Neb. 546. The presumption that insured did not intentionally take his own life is rebuttable. *Hardinger v. Modern Brotherhood of America,* 72 Neb. 869. Where different minds may reasonably draw different conclusions from the testimony on an issue of fact in a civil case, it is error to direct a verdict. *Suiter v. Park Nat. Bank,* 35 Neb. 372; *Gillis v. Paddock,* 77 Neb. 504; *Tarnoski v. Cudahy Packing Co.,* 85 Neb. 147. In the present case, may different minds reasonably draw different conclusions from the proofs on the issue of suicide? Would the evidence sustain a finding by a jury that insured intentionally took his own life? No testimony was offered on behalf of plaintiffs. They rely on the admitted fact that insured died from carbolic acid poisoning and on the presumption of accidental death. The home of insured, at the time of his death, was a summer cottage near Carter lake. Early in the morning he was found dead in a garage in the rear of his cottage. His clothing consisted of a shirt and pantaloons. His feet were bare. He had swallowed three ounces of carbolic acid. Death resulted from the taking of the poison. Evidence of these facts is uncontradicted. The circumstances outlined tend to rebut the presumption that insured was prompted by the instinct of self-preservation. The incidents narrated by defend-

ant's witnesses might reasonably lead jurors to conclude that insured committed suicide. From all of the testimony on that issue different minds might reasonably draw different conclusions. The question of fact, therefore, should not have been withdrawn from the jury, and the trial court erred in directing a verdict in favor of plaintiffs.

Plaintiffs contend further that the judgment in their favor should be affirmed on the ground that defendant admitted in its answer that insured's death was accidental. This contention is based on defendant's allegation that a by-law limited to $500 the insurance for injuries resulting from the "accidental taking of poison." It is argued that this defense is available only where death results from the accidental taking of poison, and that the plea amounts to an admission that insured's death was accidental. If the position of plaintiffs is tenable, defendant cannot plead in its answer both the defense of suicide by the taking of poison and the by-law limiting the liability in such event to $500. The refinement is too subtle for the practical purposes of pleading under the Code. The demands of justice call for a more liberal rule. The defenses are not inconsistent. Proof of one does not disprove the other. The rule in harmony with Code pleading has been correctly stated as follows:

"A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false." *Home Fire Ins. Co. v. Decker,* 55 Neb. 346; *Hilmer v. Western Travelers Accident Ass'n,* 86 Neb. 285; *Havlik v. St. Paul Fire & Marine Ins. Co.,* 87 Neb. 427; *Ford & Isbell Lumber Co. v. Cady Lumber Co.,* 94 Neb. 87.

For the error in directing a verdict in favor of plaintiffs, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

CELIA G. CHANDLER, APPELLEE, V. ROYAL HIGHLANDERS, APPELLANT.

FILED MAY 5, 1917. No. 18772.

1. **Insurance**: BENEFICIAL ASSOCIATION: AGENCY: PRESUMPTION. The secretary of a local lodge or circle who collects dues from the members of a fraternal beneficiary association and remits to the association is the agent of the association, and the law presumes that he informs his principal of what he does in its service.
2. ———: ———: PAYMENT OF DUES: WAIVER. If such association adopts a custom of receiving payment of dues after the day named in the contract for such payments, and thereby leads the assured to believe that his policy will not be forfeited if he pays in accordance with such custom, the association thereby waives the right to forfeit the policy for delay of payment which is tendered in accordance with such custom.
3. ———: ———: ———: CUSTOM. But if payments are duly made for the insured by the local lodge or its secretary as a loan to the insured, at his request, the fact that the insured does not return such loan to the lodge or its secretary as agreed by him will not establish a custom to extend time of payment on the part of the association.
4. ———: ———: ———: PRESUMPTION. If the lodge or its secretary advances the payments when due for the insured, and afterwards receives payments thereof from him, the presumption, in the absence of evidence, is that it was at the request of the insured, and as a loan to him to enable him to comply with his contract.
5. ———: ———: FORFEITURE: WAIVER. Under such circumstances, the association cannot be held to have waived the right to declare a forfeiture when so provided in the contract, if payments are not forwarded to the association within the time specified therein.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Hainer & Craft and *A. W. Lane,* for appellant.

B. F. Good, C. Petrus Peterson and *R. W. Devoe, contra.*

SEDGWICK, J.

This is an action by the beneficiary to recover $2,000 on a certificate of life insurance issued December 8, 1905, by

defendant, a fraternal beneficiary society, to plaintiff's husband, Charles D. Chandler. The certificate provided for the payment of an assessment of $2.40 on the first day of each month, and that, for failure to pay it on or before the first day of the succeeding month, the member should stand suspended from all benefits of the society. Chandler, at the time of his death, which occurred May 28, 1908, had not paid the assessment due April 1, 1908, and delinquent May 2, 1908. Plaintiff pleaded that defendant had repeatedly accepted and retained assessments long after they had become delinquent; that it had induced Chandler to believe assessments need not be paid promptly; and that defendant had thereby waived the right to insist that Chandler was suspended for failure to pay the April assessment on or before May 1, 1908, Chandler having died within the time usually allowed him in which to pay his past-due assessments. The defense was that Chandler's assessments, with the exception of the one due April 1, 1908, had been promptly received at the head office of the society, but under an arrangement with the secretary of the local lodge the latter, out of his own funds, had in some instances advanced Chandler's assessment when due and was subsequently reimbursed by him; that the local secretary by express terms of the society's edicts, which are parts of the insurance contract, had no authority to waive the provision requiring prompt payment of assessments; and that the chief officers of the society had no knowledge that assessments were not paid by Chandler when due. At the close of the testimony each party requested a peremptory instruction. From a judgment on a directed verdict in favor of plaintiff, defendant has appealed.

Did defendant, by its course of dealings with Chandler, waive prompt payment of the April assessment? It is a fraternal beneficiary society, and has at Hartington a subordinate lodge or castle of which Chandler was a member. Members were required to pay assessments monthly to the secretary of the local castle, and it was his duty to report and remit all assessments to the chief secretary

of the society by the fourth day of the succeeding month. At least six times within a year, Chandler had failed to pay his assessment before it became delinquent. The assessement due February 1, 1908, was not paid by Chandler until April 1, 1908, 31 days after it had become delinquent. Chandler died May 28, 1908, the April assessment, which became delinquent May 2, 1908, not having been paid.

Testimony tending to prove the facts narrated would sustain a finding that defendant waived prompt payment, unless the defense already outlined was established. On behalf of defendant the local secretary testified, in substance: That at least six times within a year the witness had advanced out of his personal funds the money to pay Chandler's assessment, and had remitted it to the head office with his regular monthly report and remittance. He had remitted Chandler's February assessment with the report of March 3, 1908, and had been repaid by Chandler April 1, 1908. He did not deliver the receipt to Chandler until the latter paid the sum due. Chandler gave the witness a check April 1, 1908, to pay the February and March assessments. The April assessment was not paid, and in his report the local secretary marked Chandler suspended.

A waiver must be pleaded and proved by the plaintiff, and the defendant's answer to it is either a general denial or a specific denial showing what the facts were. This needs to be borne in mind, because, though certain presumptions might arise in favor of the plaintiff touching waiver, the burden of proof is always upon her. The waiver pleaded is that the defendant is estopped to claim a forfeiture according to the terms of the policy by its course of dealing with the deceased; that defendant, by continuously accepting payments after due, without declaring a forfeiture, would naturally lead the insured to believe that a strict compliance with the terms of the policy was not required. This calls upon plaintiff to plead and prove the course of dealing which would lead the deceased, as a

reasonable man, to believe that payments need not be made when due; that he relied thereon; and that he was thereby misled. To prove the waiver the plaintiff must prove the custom of receiving the payments after due; that the payments so made were received and retained by the defendant company with knowledge that they were past-due payments. These propositions of law will not be disputed.

In the case at bar, unlike the cases cited, money due for assessments always came to the company when due. If, when Dr. Eby sent money to the defendant, he had informed them that the Chandler assessment was paid by him out of his own funds, he having loaned it to Chandler, it would not create, or tend to create, an estoppel or waiver. You cannot assume belated payments when, as to the company, there were none, and an essential fact to create the waiver must be the retaining of assessments paid after due. This is illustrated in defendant's brief by stating that oftentimes it happens that local lodges will raise a fund to help out members unable to pay their assessments on time. The local lodge sees that the company gets its payment for such member when due, just as Dr. Eby did. It must frequently happen in such cases that the local lodge will itself refuse further aid. It is stated that the courts in no instance have allowed this to create a waiver by the company itself; it always having received the assessments when due. When the company received its money the first of the month, no matter by whom paid, its business with Chandler was ended for that month. If, when Eby advanced the money, he told the company the facts, it would have had a right to suppose it was a loan. When afterwards he collected the money from Chandler he would be acting only in his private capacity and in no sense as the agent of the company. If Eby loaned the money to Chandler, then he acted as Chandler's agent in applying the money as payment of Chandler's dues. If their agreement was that Eby should make these payments for Chandler when due, and that Chandler should afterwards reimburse

him, the transaction was a loan by which Chandler caused the payments to be made when due.

It may be said that, considering the testimony, a jury could reasonably find that Chandler had no knowledge that his assessments were paid by the secretary when due. But what his knowledge was must be a presumption arising from admitted facts, there being no direct evidence as to his knowledge. A jury will not be permitted to find contrary to the legal presumption. If there were no decisive presumption either way, then, the burden being upon the plaintiff, upon that point the finding must be against her. The law will presume that Chandler knew the rules of the society, and when he must make his payments or forfeit his rights, and that he would follow self-interest. The law will presume that he knew that Eby could not make a waiver for the society for his benefit. Knowing that, the law will presume that he knew or believed either that Eby had remitted for him, or that he was himself guilty of laches. The law will presume, also, where it is a pure question of fact, that all persons will endeavor to do their duty, will meet their obligations and observe their contract; that one man will not pay the debts or the obligations of another, except at the other's instance or request. To say that Dr. Eby did so is to do violence to common experience, from which all presumptions arise. Not once in a thousand times would a man in Dr. Eby's place make advancements out of his own pocket for the accommodation of another without informing him. Such being the presumption, it follows that Eby, having made the advancement, did it at the instance of Chandler. The alternative presumption that Chandler believed that the society, knowing that he had not paid, was waiving time of payment, cannot be indulged, because of the other presumptions above named, and especially the one that Eby would not make personal advancements without either being requested or at least informing Chandler that he did so. The presumption must prevail that Chandler knew that Eby was making these payments for him when

due. It is said that Dr. Eby retained the receipt until he received the money. That does not alter the fact of payment, and does not affect the presumptions just alluded to, because common experience is that any man, paying the obligations of another, and procuring a receipt, would always, as a matter of prudence, retain the receipt until he should be repaid his advancement. The evidence shows that when Dr. Chandler repaid Dr. Eby he did it in a personal check to him, not one running to him as an official. If Dr. Chandler had believed that Dr. Eby had power to waive payments when due, the case might be different; but we are not permitted to indulge the presumption that he believed that. He was bound to know the contrary.

The plaintiff objects that certain evidence of Dr. Eby was incompetent; but the evidence conceded to be competent, with the presumptions of law that arose therefrom, establishes that Dr. Eby advanced the money for Dr. Chandler upon the latter's request and as a loan. The company knew this if it was bound to know what its agent knew. With this loan Chandler caused his payments to be made when due. This loan was the private business of Chandler and Eby, and was not the company's business. It received its money when due, and by so doing waived none of the terms of its contract.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., and LETTON, J., concur in the conclusion.

ROSE, J., dissents.

ARTHUR J. KOENIGSTEIN V. STATE OF NEBRASKA.

FILED MAY 5, 1917. No. 19418.

1. **Jury: SPECIAL VENIRE.** Section 9106 Rev. St. 1913, applies only when two or more persons are charged in the same indictment or information, and one of them so charged has had a separate trial. Under that section to obtain a new jury the clerk must procure a list of 60 electors of the county, and the jury is selected from this list.

2. ———: ADDITIONAL JURORS. Under section 8143 Rev. St. 1913, the court orders the sheriff to "summon without delay good and lawful men, having the qualifications of jurors." These are summoned from the body of the county, and the sheriff is not required to apportion them equally to all parts of the county. Such a method of selecting jurors to try a particular case is exceptional, and should not be lightly resorted to.

3. **Criminal Law: FORMER JEOPARDY.** *Res adjudicata* is a fundamental principle in civil cases, and the corresponding principle in criminal cases is that no one shall be twice put in jeopardy for the same offense. It is only when the same matter is in issue in both cases that the defendant can be said to be put in jeopardy for the same offense in both cases. A trial jury is not expected to base its opinion of the weight of the evidence upon the opinion of other men, and is not to be influenced by the consideration of what any other jury has or might have done upon the same state of facts.

4. ———: EVIDENCE: RECEIVING BRIBES. But under the general allegation of an indictment that the defendant received a bribe from a specified keeper of a disorderly house, it is competent to prove that the defendant adopted a plan or system requiring each and all of the disorderly houses in the vicinity to pay him a specified sum to prevent prosecutions; and that pursuant to that plan not only the person alleged, but also other persons similarly situated, paid defendant such bribes.

5. ———: ———: ———: FORMER ACQUITTAL. Under such circumstances the former acquittal of the defendant upon an indictment charging him with receiving a bribe from the keeper of one of such disorderly houses will not exclude evidence of that offense upon a subsequent trial of an indictment for receiving a bribe from the keeper of another such house. Such evidence is allowed only for the purpose of strengthening the evidence of the offense charged in the subsequent trial by showing the general

plan or system under which the bribe was received. The two crimes are distinct, and neither is an element of the other. But when such evidence is introduced the defendant should be allowed to prove his acquittal on the former trial.

6. ———: INSTRUCTIONS: DUTY OF COURT. In instructions intended to guard against mistakes or oversight by the jury, if the interest of the court or of the state at large in the conviction of the guilty is suggested, care should be taken to avoid the impression that this is of more importance than is the acquittal of the innocent. It is erroneous to impress upon the jury the importance of the conviction of the guilty without also as effectively guarding against the conviction of the innocent.

7. ———: MISCONDUCT OF JUROR. The jury must determine the issues submitted solely upon the evidence admitted in open court upon the trial. If any juror assumes to state facts that may be known to him, which might influence the verdict, and which were not admitted by the court with opportunity for cross-examination, such misconduct will vitiate the verdict and require a new trial.

ERROR to the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

Reese, Reese & Stout, H. F. Barnhart and *Jack Koenigstein,* for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and *William L. Dowling, contra.*

SEDGWICK, J.

The defendant was found guilty of accepting a bribe while acting as county attorney of Madison county, and was sentenced to imprisonment in the penitentiary from one to five years. He has brought the case to this court for review.

The first questions presented are as to the impaneling of the jury. It appears that there were two indictments pending against the defendant at the same time; both charging him with accepting bribes from respective keepers of disorderly houses in or near the town of Norfolk. The defendant was tried upon one of these indictments and found not guilty, and at the same term the case at bar was about to be tried, and the prosecuting attorney filed a motion "to discharge the regular panel of jurors summoned

for the special September, 1915, term of said court, and to enter an order causing a special venire of jurors to be called to try the above entitled cause." It appears that upon the former trial of the defendant at the same term of court it was contended, and there was some evidence indicating, that while he was county attorney he had required each one of the disorderly houses in the town to pay him a regular monthly bonus, and in consideration of such payment had refrained from prosecuting them. The indictment indicated that the same contention would be made in the case at bar. The jurors of the regular panel had all heard the evidence in the case that had been tried, eleven of them were upon the jury that tried the case, and the remainder of the members of the panel were in the courtroom more or less at the time of the trial and heard the evidence and argument of counsel. Upon these facts the court discharged this regular panel, and directed the sheriff to "summon without delay twenty-four (24) good and lawful men, having the qualifications of jurors, to fill and complete the panel." This was done immediately, and the defendant filed a motion and affidavit objecting to the jurors summoned by the sheriff. In an affidavit filed by him he stated "that the regular panel and bystanders are incompetent, because of having heard the evidence, or a part thereof, in the former trial, to sit as jurors in this cause." This proceeding of the court in quashing the panel was not authorized by section 9106, Rev. St. 1913. That section applies when two or more persons are charged in the same indictment or information, and one of them so charged has had a separate trial. If then the court is "satisfied, by reason of the same evidence being required in the further trial of parties to the same indictment or information, that the regular panel and bystanders are incompetent, because of having heard the evidence, to sit in further causes in the same indictment or information," then the court may require the clerk to prepare a list of 60 electors of the county, and the jury is to be selected from this list. This method of proceeding was not followed, the court un-

derstanding that the section did not apply in this case, but the motion of the prosecuting attorney to quash the panel was sustained apparently because the court found that each and every juror upon the panel was disqualified to sit, having already heard the evidence in the case, and of course having heard the public discussion that would follow after the first trial. Under these circumstances, if the jurors of the regular panel had been severally examined on their *voir dire,* none of them would have been allowed to sit in this case, and therefore excluding them under this general order was not erroneous.

The order of the court directing the sheriff to summon 24 jurors was authorized by section 8143, Rev. St. 1913: "Whenever at any general or special term, or at any period of a term for any cause there is no panel of grand jurors or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men, having the qualifications of jurors." Under this order of the court the sheriff called 24 jurors, and the defendant then filed an objection "to the panel of petit jurors summoned for the trial of this cause by the sheriff of Madison county." The grounds of this objection alleged by the defendant were because a list of persons from which this jury was drawn was composed of persons residing in one particular locality of the county, and none of the jurors were selected "from residents of Norfolk precinct which contains at least one-third of the population of the county," or from six other specified precincts of the county. "The prisoner has the right to insist that the list of persons from which the panel is drawn be filled in due proportion from all of the precincts within the trial district, and not from a part only." *State v. Page,* 12 Neb. 386. In the same case it is said that, if the county commissioners in preparing the regular jury list overlooked a precinct containing one-third of the whole number of persons in the trial district qualified to serve, the panel would be illegal, but in such case "the court has ample authority to provide a lawful jury under section

664 (Rev. St. 1913, sec. 8143)." *Barney v. State,* 49 Neb. 515. Under section 664 the sheriff summons "good and lawful men, having the qualifications of jurors." These are to be called from the body of the county, and the sheriff is not required to apportion them equally to all parts of the county. This point was determined in *Welsh v. State,* 60 Neb. 101, in which case the court said: "In cases where a jury is drawn in the manner prescribed by said section 658 *et seq.* of the Code of Civil Procedure the provisions thereof must be observed. That they are mandatory we do not doubt, particularly those provisions which require that the panel must consist of persons drawn, as nearly as may be, from all portions of the county, in proportion to their population, and this we understand to be the rule laid down in most of the cases of this court cited by counsel for defendant in support of the proposition that the panel in this case was illegal. But no such requirement is prescribed by section 664, hence it was unnecessary that the jury in this case be so selected." Such a method of selecting jurors to try a particular case is exceptional and should not be lightly resorted to. It was said in the case last cited: "The authority conferred by this section should be sparingly exercised and exigencies should not be purposely created by the courts for its exercise. This defendant suffered no injustice through such proceeding, and the lower court must be sustained in its action."

The next objection presented in the brief is: "The court permitted the introduction of evidence of the identical acts complained of in the former charge (trial), which had been found not true, and refused to permit the introduction of evidence of such acquittal." The theory of the prosecution was that the defendant as county attorney adopted a plan or system of requiring each and all of the disorderly houses in the town to pay him a specified sum to prevent prosecutions. The first witness introduced by the state testified that he was a driver of a taxicab, engaged in carrying passengers from place to place in the town for hire, and that he, at the defendant's request, took him to each

of the disorderly houses in the town, and that afterwards the witness received money from each of the keepers of these houses at or about the first of each month and delivered the money to this defendant. It appears to be seriously contended that the indictment is not sufficient to admit this class of testimony, but there seems to be no ground for this contention. In *Guthrie v. State,* 16 Neb. 667, several questions were considered. The indictment in that case alleged the receipt of $300 as a bribe, and alleged that the $300 was paid by one Branch "and other persons whose names are to the jurors unknown." The proof showed that it was paid by Branch alone, and it was held that there was no fatal variance between the allegation and the proof. In the case at bar the allegation is that $75 was paid by Nannie Meyers and Riley McLimans and there was proof that the $75 was so paid. The indictment continued, stating how and for what purpose the $75 was paid, and in that regard alleges that it was paid for the purpose of permitting Nannie Meyers "and other persons to the grand jurors unknown" to carry on unlawful business. The proof tends to establish that the $75 charged in the first count of the indictment as paid by Nannie Meyers and McLimans was paid in pursuance to a general plan and system whereby similar amounts were to be paid by other persons and all persons so paying were to be protected from prosecution. Under the opinion in *Guthrie v. State, supra,* this proof would have been admissible under the general allegation of payment by Nannie Meyers and Riley McLimans. The court said: "It is clearly shown that the agreement was a continuing one, and contemplated a system of payments to be made in the future, and for which the same course was to be pursued by plaintiff in error as for the $300. It was known by plaintiff in error when Branch received money, and no gambling house was molested after its share of the money had been paid. He was fully advised of what occurred in the workings of the plans and designs, not only at the time of the receipt of the $300, but at all times, so long as the system under

which they were working continued. This system was fully developed and exposed by Branch in his testimony. It was properly admitted as a part of the transaction in which the $300 was paid by Branch to plaintiff in error. The fact of the carrying out of this system was proper evidence for the purpose of corroborating the testimony of Branch, and showing the purpose, understanding, and intent with which the money was received as alleged in the indictment, and for the purpose of showing the system under which these several transactions were had."

And, so in the case at bar, under the allegation that $75 was paid for such purpose by Meyers and McLimans, it was competent to prove that it was paid under a system by which all violators of the laws similarly situated were to make similar payments and were to be protected. This seems to be well supported by authority. Judge Wharton says: "When the object is to show system, subsequent as well as prior collateral offenses can be put in evidence, and from such system identity or intent can often be shown. The question is one of induction, and the larger the number of consistent facts, the more complete the induction is." Wharton, Criminal Evidence (10th ed.) sec. 146.

In *Frazier v. State,* 135 Ind. 38, the court adopted the following language quoted from text-writers: "A series of mutually dependent crimes may be shown where they tend to prove that they were committed under a system which becomes relevant to the inquiry."

In *Wallace v. State,* 41 Fla. 547, the law is declared to be: "Where the crime in question is one of a system of criminal acts occurring so near together in point of time and so nearly similar in means as to lead to the logical inference that they are all mutually dependent and committed in pursuance of the same deliberate criminal purpose and by means planned beforehand, evidence of such other acts is admissible, even though those acts amount to another criminal offense." This seems to be the general rule.

The evidence admitted to show this plan and system of the defendant included evidence of money received from one Fern McDonald, which was the substance of the charge upon which the defendant had been formerly tried and acquitted. In rebuttal the defendant offered in evidence the indictment in the former case identifying the payments so received as the same payments upon which the defendant was formerly tried. The defendant then offered in evidence the verdict of acquittal in the former case. Upon objection of the state this was excluded. The general rule is that the verdict of the jury in another case between different parties is not competent evidence of the fact so found by the jury. The reason of that rule is that the verdict of one jury is not evidence to be considered by another jury in determining the same question. But in this case the former trial was between the same parties as the present trial. The defendant relies upon *Mitchell v. State,* 103 Am St Rep. 17 (140 Ala. 118), which holds: "If, on the trial of an accused for the commission of one crime, evidence is permissible and is introduced of the commission of another similar crime for the purpose of showing the intent with which the crime charged was committed and the identity of the accused as the person who committed it, he is entitled to introduce in evidence the record of a court showing his trial and acquittal for such other crime. Such evidence is admissible under the doctrine of *res adjudicata.*" And it is said in the opinion: "Whether the production in evidence of a record such as defendant offered to produce would have rendered the state's evidence of the burning of Murphey's house subject to exclusion is not a question here raised or determined." It would seem that if his acquittal in the former trial for a distinct offense would be *res adjudicata* of the principal fact therein charged, so as to determine that question for the subsequent trial for another offense, it would be the duty of the court in the subsequent trial to instruct the jury that it was established that this defendant did not receive the bribe so charged as the substance of the former offense. The receiving of a bribe

from Fern McDonald was the substance of the offense charged in the former trial, and undoubtedly the state could not rely upon such allegation as the substance of any subsequent charge, or as an essential element of any criminal charge against the defendant. The Constitution prevents putting a person in jeopardy the second time for the same offense, and when the essential element of any crime has been determined the defendant cannot be again required to defend against it. The receipt of bribes from Fern McDonald is not in issue in this case. It is only when the same matter is in issue in both cases that the defendant can be said to be put in jeopardy for the same offense in both cases. Parker, C. J., in *King v. Chase,* 15 N. H. 9, 41 Am. Dec. 675, speaking of *res adjudicata* in civil cases, said: "Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue, in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue, within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. * * * But facts offered in evidence to establish the matters in issue are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial." This doctrine has been repudiated by some text-writers, and also by some courts, but appears to us to be sound.

Res adjudicata is a fundamental principle in civil cases, and the corresponding principle in criminal cases is that no one shall be twice put in jeopardy for the same offense. This distinction is stated by Judge Wells: "The principle —which is parallel to the principle prevalent as the fundamental rule in civil cases—is that no one shall be twice

put in jeopardy for the same offense. And, accordingly, the primary inquiry under it is, when does jeopardy attach, so as to be a bar to any subsequent prosecution?" Wells, Res Adjudicata and Stare Decisis, 318, 319.

But in the present trial the defendant is not put in jeopardy of conviction of receiving bribes from Fern McDonald. The payment by her is not an element of the crime for which he is now tried. That evidence could not be omitted in proving the general plan and design under which the money was received from Nannie Meyers, and so far as such evidence is allowed it is only for the purpose of strengthening the evidence of the substantial charge now being tried. The trial jury is not to be controlled by the consideration of what any other jury has or might have done upon the same state of facts. They are not expected to base their opinion of the weight of evidence upon the opinions of other men. Under the holding of Parker, C. J., above quoted, this evidence would not be excluded in the application of *res adjudicata* in civil cases. At all events it seems that receipt of such evidence cannot be said to put the defendant in jeopardy the second time for the same offense. We think the evidence of the receipt of bribes from Fern McDonald, tending as it does to prove the general system or plan of defendant, was competent. The fact that defendant was acquitted of that crime in the former trial is not to be considered as *res adjudicata* in this trial. While the forming of the plan and purpose of exacting money in the nature of bribes from all of the disorderly houses of the town and vicinity would not of itself constitute a crime defined in our law and subject to punishment, the act of accepting a bribe being the substance of the crime so defined, yet the fact of forming and attempting to execute such a general plan would, if proved, strongly support the evidence of the definite crime charged. The state attempted to prove more payments of that nature by the witness Fern McDonald than by any other person. It appears also that in the former trial the state attempted to prove the same corrupt plan and purpose as was made

so prominent a feature in the trial of the case at bar. While this general plan was not an element of the crime charged, and the result of the trial did not necessarily depend upon the existence or nonexistence of such plan and purpose, still it was a question of fact in evidence in both trials, and a very important one. Without this evidence it may well be doubted whether the defendant would have been convicted in the case at bar. While the verdict of acquittal in the former trial is not to be considered as determining that collateral question for the purpose of the subsequent trial for a distinct offense, we think that, when so much of the the evidence of the former trial was before the jury in the case at bar, justice required that the former verdict should also have been allowed in evidence.

The statute authorizing the court to require the sheriff to call jurors from the bystanders or from the body of the county for the trial of a particular case should be made use of only when it is reasonably certain that the case to be tried will not be prejudiced by such method of selecting a jury. Under the circumstances in this case it would not in general be expected that a jury would be so selected. If the defendant is to be successively tried upon charges which in the law are regarded as distinct from each other, and yet which admit of the introduction of much of the same evidence to support the respective charges, great care should be taken to protect the interest of the state and the rights of the defendant against any prejudice that might have arisen from the former trial, and ordinarily both cases would not be tried at the same session of the court. Under our former decisions there has been no technical violation of the law in that regard, and yet it may well be doubted whether the results of the second trial may not have been in some degree influenced by the transactions in the former trial. Under such circumstances, if there were a sufficient number of trials in succession at the same session of court, the acquittal of an innocent defendant in all of the trials might not be as certain as the public interest requires.

Evidence that the various houses of prostitution were open and being operated during the time named in the indictment was competent, but apparently the cross-examination of the witness McLimans who testified to these facts was somewhat too restricted. This perhaps was owtions were propounded to this witness upon this cross-exing to the fact that so many apparently unnecessary quesamination.

There seems to have been some attempt made to show that there was a conspiracy among the keepers of these houses and their patrons to prosecute this defendant unjustly. So many of the witnesses were connected with these houses that this would have been an important matter if it had been established by the defendant. Many questions were asked by defendant's attorney in the cross-examination of the plaintiff's witnesses with this object in view, and there are many assignments of error in the brief predicated upon sustaining objections to these questions. Many questions and answers were allowed that might have been excluded, and it seems probable that in some instances evidence was excluded that might have been allowed. This was almost unavoidable under the circumstances. In many cases the purpose of the question was not as plain to the court as it may have been to counsel. As the case may be tried again we have gone somewhat into detail, but we cannot attempt an analysis of this evidence, covering as it does more than 600 sheets of closely typewritten matter.

The witness Nannie Meyers testified to a conversation with the defendant at the defendant's office in which the defendant said she could have no police protection in running her house, the only protection she could have was what he, the defendant, could give, and asked her what that would be worth to her. She was then asked whether she heard from him after that, and testified that the witness Riley McLimans called at her house, and, representing that he was sent there by the defendant, asked her if she was going to send that money to the defendant. She was

then asked, "What did you say?" This was objected to as incompetent and hearsay. The court overruled the objection, and she answered, "I said, 'Yes,' but I didn't have it, and I asked him if it would be all right in a few days, and he said he didn't know, but he would see. Q. Was anything said about whether the other women had paid? A. I asked him if the other women had paid, and he said, 'Yes.'" It is insisted that this evidence was incompetent and prejudicial. There was, however, evidence that the defendant himself had represented to this witness and others that McLimans would receive this money for him, and although this was denied by the defendant, still if the jury believed that McLimans was authorized to receive the money for the defendant this evidence would not be prejudicially erroneous so as to require a reversal.

There are many assignments of error upon the rulings of the trial court in admitting and excluding evidence. In some instances the trial court might properly have been more liberal in the cross-examination of the state's witnesses, and also in the defendant's offer of evidence.

Instruction No. 3, given by the court, appears to be rather more particular to guard the interests of the state than those of the defendant against mistakes or oversight by the jury. Great care should be taken in such instructions to avoid the impression that the state is more interested in conviction than in acquittal. "It is essential to the peace and welfare of society and good government that every guilty man be punished, when his guilt is established by a measure of proof required to convict of crime in a court of justice. * * * You should not allow your minds to be influenced by consideration of sympathy for the defendant, or for his family or friends." This instruction presents pretty strongly the interest of the state in conviction. The corresponding statement, "You will readily appreciate its importance to the defendant, because it involves his liberty," perhaps infers that the state is equally interested in the acquittal of an innocent man, but does not present that idea as emphatically. Under the circum-

stances in this case this instruction was prejudicial to dedefendant.

One of the grounds for the motion for new trial was that there was misconduct of one of the jurors in the jury room while the jury was considering their verdict. Three several jurors testified that the juror Yeazel stated in the jury room to the jurors, in substance, that he had known the defendant since boyhood, and that he knew his reputation, and that it was bad, and stated some things as facts to the jury which, if true, would indicate that the defendant's character and reputation was bad, and that the said Yeazel continued in this sort of recital to the jury until he was stopped by the foreman of the jury. This evidence of these three witnesses was denied by the juror Yeazel, and also denied by one other juror, who testified that the juror Yeazel did state that he knew the defendant when he was a boy, but that he did not state the other matters attributed to him. This witness stated that cots were put up for them, and that during the night he went to sleep and slept until 7 o'clock the next morning. He was asked if it was possible that Yeazel might have made the remarks attributed to him by the other jurors, and answered, "It is possible, I presume, but not probable. * * * I couldn't say I heard every word because we were all talking a good deal. Q. And at times some were talking in one part of the room and others in the other part? A. Yes, they was talking to some extent." The foreman of the jury was not called as a witness. Such a recital of alleged facts as it is charged this juror made would be misconduct and would vitiate the verdict. The preponderance of the evidence is that the juror Yeazel was hostile to the defendant, and that he stated as facts within his knowledge substantially the matters testified to by the three jurors referred to.

For the reasons indicated, we cannot affirm the judgment, and it is therefore reversed and the cause remanded for further proceedings.

REVERSED.

LETTON and ROSE, JJ., dissent.

STATE OF NEBRASKA, PLAINTIFF, V. GEORGE CORDING, DEFENDANT.

FILED MAY 5, 1917. No. 19540.

1. **Public Lands: CONVEYANCE: CONSTRUCTION.** The state is not bound by the unauthorized acts of its agents, and public policy requires that such acts be restrained, and, when contrary to public interest, annulled. When, however, the state by its authorized agents executes a conveyance that is ambiguous or susceptible of different constructions as to the intention or purpose of the state, and a definite construction of its meaning and of the intention and purpose of the state in executing the same has been understood and acted upon by the public generally, and knowingly acquiesced in by the state, the original right of the state to assert a different construction of the conveyance may, by great lapse of time, be considered as abandoned, if the assertion of such right will manifestly work an injustice.

2. ———: ———: ———. Under the circumstances in this case, indicated in the opinion, it is considered that, the public generally having acted upon the understanding that the deed of the state was intended to convey the land in question, and the state having knowingly acquiesced in that construction of the intention of the state for more than 40 years, the state ought now to be held to have abandoned any other construction of its deed.

Original action in ejectment. *Judgment for defendant, and action dismissed.*

Willis E. Reed, Attorney General, Dexter T. Barrett and *George W. Ayres,* for plaintiff.

Hainer, Craft & Edgerton and *Heasty & Barnes, contra.*

SEDGWICK, J.

The state brings this original action in this court to recover 80 acres of land. In 1872 the state conveyed a large tract of land "for works of general improvement" to the Omaha & Southwestern Railroad Company, pursuant to and in harmony with the act of congress under which the lands were granted to the state. The deed from the state to the railroad company conveyed lands adjoining section 7,

and described seven-eighths of the section by particular descriptions, omitting one-half of one quarter of the section, being about 80 acres, and the land here in controversy. The deed stated that the land conveyed by the state was 626.18 acres, the number of acres shown by the government survey to be included in the entire section.

The question might well have been raised whether this 80 acres of land that is now in question was intended to be conveyed and was omitted by mistake. The state for about 40 years construed this deed as conveying the entire section. During that time this defendant purchased this 80 acres of land, and took a conveyance purporting to convey the title, and had held it under this color of title for about 20 years. This 80 acres of land was assessed for taxation prior to 1889 and in that year, and continuously from the year 1889 until the present time. The state has received the benefit of these taxes, and all of the officers of the state from the time of the conveyance by the state in 1872 knew that in construing its deed as a conveyance of the entire section the state would be able to collect taxes thereon, and has continued in various ways to construe its deed as conveying this 80 acres of land in question, and has acquiesced in the construction which this defendant and his grantors placed upon the deed and upon the intention of the state in executing the same. In *State of Michigan v. Jackson, L. & S. R. Co.*, 69 Fed. 116, the court of appeals of the sixth federal circuit said: "While it is necessary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time, after long-continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights." Relying upon this construction of the intention of the state in making this conveyance, this defendant has improved the land in question, and the state ought not now to deny that it was the intention of the state to convey the whole section by its deed.

Upon these facts we find in favor of the defendant, and the action is DISMISSED.

ROSE, J., dissenting.

I understand the majority opinion to create a species of estoppel having the virtue of a warranty deed, whereby a private individual may, in the absence of legislative grant or gift, procure from the state of Nebraska, in violation of a public trust, title to public land without buying it or paying for it. The decree of the majority transfers from the state of Nebraska to defendant for private use title to 80 acres of land held for public purposes. The state of Nebraska acquired the land from the United States for internal improvements, and never sold it or parted with the title. One of the purposes of the federal grant was to furnish aid in the construction of railroads. All of the land included in the grant was held by the state of Nebraska in trust. As to the 80-acre tract in controversy the trust has never been executed. The land can only be used by the state of Nebraska for internal improvements. *Koenig v. Omaha & N. W. R. Co.*, 3 Neb. 373. Aiding in the construction of railroads was a far-reaching governmental purpose of the nation and the state. These railroads were by the Constitution made public highways. Const., art. XI, sec. 4. They are now connecting links between a granary of the world and the highways of the nations. Lands held by the state of Nebraska in trust for such improvements should not be frittered away for the benefit of private individuals either by fiction of the law or by unauthorized acts of public officers.

The state is bound only by officers acting pursuant to legislative authority. The board of public lands and buildings did not transfer the title, and other officers were without power to do so. An officer can perform no official act not authorized by written law. His powers are defined by the legislature, and his official acts are disclosed by public records, accessible alike to the state and private individuals. Neglect, unauthorized acts, and violation of duty are wrongs of private individuals, and not official acts binding on the state. What an officer may do on behalf of, or for, the public depends on the law, which private individuals

must know. Authorized acts alone bind the public. Those who deal with public officers must do so on statutory terms, without the prospect of procuring an advantage through violation of law, laches, or neglect of official duty. If the state of Nebraska is under a moral obligation to defendant, the legislature will discharge it upon a proper request.

State property is not subject to taxation. Const., art. IX, sec. 2. No officer can assess or collect a tax on state property. Attempts of this kind are mere wrongful acts of individuals. Estoppel does not grow out of such conduct. In these respects neither the lapse of the time nor the wrongs of individuals assuming to perform official acts grow into estoppel or title to land.

I take issue with the assertion that the state knew the facts on which the estoppel announced by the majority is based. The officers who could be charged with knowledge are not mentioned. There is no attempt to name an officer who could bind the state by knowledge of what was done by defendant or others.

The doctrines of estoppel and laches, unless adopted by statute, are not applicable to the federal or state government. *United States v. Williams,* 5 McLean (U. S.) 133; *United States v. Thompson,* 98 U. S. 486; *State v. School District,* 34 Kan. 237; *Des Moines v. Harker,* 34 Ia. 84; *United States v. Hoar,* 2 Mason (U. S.) 311.

CORNISH, J., dissenting.

I concur in the dissenting opinion of Judge Rose. Conceding that a case might arise where a conveyance by the state is ambiguous or susceptible of different constructions as to its meaning and intent, and where a definite construction has been given and acquiesced in generally by the public and the agents of the state for a long period of time, and that in such a case there might arise a conclusive presumption of fact that the construction given was in accordance with the actual intent and purposes of the state, this is not a case where such rule should be applied. Such

a rule would be one of evidence, not of estoppel, denying to the state the right to show what the facts were.

The maxim, "The king can do no wrong," as legally applied, worked for justice and in truth represented a high ideal of the state. It operated, not only for the benefit of the state, but for the benefit of those dealing with the state. It did not mean that the king was above the laws. It did mean that the state is not amenable to other earthly power, and that, being created for the benefit of the people, its powers cannot be exerted to their prejudice. It meant that the state is incapable, not only of doing wrong, but even of thinking wrong. It was under that rule that it was held that the crown cannot dispense with anything in which a subject has an interest, or make a grant in violation of the common law, or injurious to vested rights. The rule applies with even more force to the modern democratic state, in which not only is the state incapable of doing wrong, but, as a matter of fact, is not disposed to do wrong.

A law, making the state responsible for its conduct like private citizens or corporations, answerable to others, permitting it to be estopped by the wrongful acts of its agent, would not only degrade the state, but would be a law not responding to the situation as it exists. In transactions and controversies between private individuals, self-interest causes the rights of each to be protected. My 25 years of observation and experience in public office convinces me that the interests of the state are not, as a rule, as faithfully safeguarded through its agents as are the interests of private individuals. If the state buys or sells anything, or has work done, we are not surprised to learn that it has at least dealt liberally with others. The eye of the master is always upon his agent to see that he is faithful. Sometimes this is true of the state's agent, sometimes not. It seems to me, if we are to avoid what would in time amount to great losses to the state, we must hold to the rule that the state's agents are our agents, and in dealing with the state through its agents the state is bound only as the agent keeps faithfully within the law. No doubt cases will arise,

possibly the instant case, where it can be said that the state's conduct has done a citizen a wrong. If so, he should present his claim to the state. I served in the legislature two terms, when many claims against the state were presented to it for adjustment. I never knew a member who, from his expressions, appeared to act selfishly or fraudulently in behalf of the state, in consideration of a claim, and I believe there was none.

EDWARD A. SMITH, APPELLEE, v. ELIAS HOLOVTCHINER ET AL., APPELLANTS.

FILED MAY 5, 1917. No. 19452.

Schools and School Districts: EXPENSES OF OFFICERS: INJUNCTION. Expenses incurred by the president of the board of education and the superintendent of schools, at Omaha, Nebraska, in attending a congress of school hygiene, under the authority of the board, for the purpose of securing general information on the subject of school hygiene, are not necessary expenses incurred in the performance of official duties, and the treasurer of the board may be enjoined from the payment of such expenses.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Carl E. Herring, for appellants.

T. E. Brady, contra.

CORNISH, J.

On August 18, 1913, the board of education of Omaha, by resolution, directed Elias Holovtchiner, president of the board, and Ellis U. Graff, superintendent, to attend as delegates the Fourth International Congress on School Hygiene, to be held at Buffalo, New York, and also to visit several technical schools at the board's expense. This action was brought to enjoin the payment of $250, traveling expenses, incurred in carrying out the order of the board. From the court's order, granting the injunction, this appeal is taken.

Section 7027, Rev. St. 1913, provides for the levy and collection of taxes deemed necessary, as shown by the report of the board, for school purposes named, including the support of schools, purchase of school sites, and erection and furnishing of school buildings. Statutes granting power to tax are construed strictly. The purpose for which the tax is levied must come within the statute from which the power is derived. The corporation possesses only such powers as are specifically granted, and such others as are necessary for the purpose of carrying into effect those expressly given.

Cases, challenging the right to expend the public funds for expenses of public officers in attending conventions, have been before the courts, and the courts appear to have uniformly held that these are not within the scope of proper public expenditures. In the case in hand, the real object in attending the convention was educational. Strictly speaking, it had nothing directly to do with either the support of the schools, or the erection and furnishing of school buildings. Counsel for appellants believes that modern conditions require a more liberal rule. While it cannot be disputed that the municipality might derive great benefit from what its delegates might learn at the convention, yet experience has shown that, when the control of a fund and the use of it may be lodged in the same person, a situation arises which is subject to such flagrant abuses that courts have thought that this was an additional reason for that rule of strict construction made to protect the rights of taxpayers.

Expenditures of this sort, necessary to ascertain a particular fact upon which the action of the board in the management of schools is to depend, stand upon a different footing. In the instant case, the expenses of visiting the technical high schools are commingled in the claim with the expenses incurred in attending the convention. Whether such expenses would be lawful or not, since unlawful items are included that cannot be paid from money obtained by taxation, the claim should not have been allowed. For

cases bearing upon the question above discussed, see *Waters v. Bonvouloir,* 172 Mass. 286; *James v. City of Seattle,* 22 Wash. 654; *Minot v. Inhabitants of West Roxbury,* 112 Mass. 1; *Gregory v. City of Bridgeport,* 41 Conn. 76; *Austin v. Coggeshall,* 12 R. I. 329.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

F. M. HALLOWELL, APPELLANT, V. BUFFALO COUNTY, APPELLEE.

FILED MAY 5, 1917. No. 19479.

1. **Judges:** DE FACTO OFFICERS. A county judge was removed from office by a judgment of the district court declaring the office vacant. After three days the county board duly appointed another person to fill the vacancy. He qualified, took possession of the office, performed its duties, received its fees, and was generally recognized as the one in authority. Afterwards, on appeal, the judgment of ouster was held void, and the duly elected official was reinstated in office. *Held,* that the appointee of the county board performed the duties of the office with color of title and was officer *de facto.*
2. ———: ———: SALARY. "Where a county has once made payment of the salary of a county office, to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer." *State v. Milne,* 36 Neb. 301.
3. **Appeal:** REVERSAL: MANDATE. "When the judgment of a district court is reversed, a mandate is the proper and legal mode of communicating the judgment and directions of the supreme court to such district court." *Horton v. State,* 63 Neb. 34.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sinclair and *T. F. Hamer,* for appellant.

Albert B. Tollefsen, contra.

CORNISH, J.

Plaintiff was removed from the office of county judge June 15, 1913, by a judgment of the district court declaring the office vacant. After three days, no one in the meantime performing the duties of the office, the county board appointed one Morrison to fill the vacancy. He duly qualified, took possession of the office, performed its duties, received its fees, and was generally recognized as *de facto* officer until February 5, 1914, when, by mandate from the supreme court, he was removed, and plaintiff reinstated in the office. In the supreme court's decision it was held that the district court was without jurisdiction of the subject-matter, and its judgment would therefore be void. *Conroy v. Hallowell,* 94 Neb. 794. Plaintiff brings this action to recover from the county his salary, $1,053.85, being the amount paid by the county to Morrison during the time he was removed from office.

In *State v. Milne,* 36 Neb. 301, we held: "Where a county has once made payment of the salary of a county office, to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer."

The acts of such an officer are valid, and are sustained upon the ground that it would be intolerable that the general public, having business to do with the office, should be required to determine at their peril who is the rightful incumbent. The county board, in allowing such an officer his fees and salary, has a right to rely upon his apparent title and to treat him as an officer *de facto.* The board being justified in allowing him the emoluments of the office, the county cannot afterwards be compelled to pay them again.

Because the judgment of the district court, removing him from office, was finally found to be void, and because Morrison was an appointee of the county board, plaintiff disputes the proposition that Morrison was a *de facto* officer, or

held under color of title, and contends that he should be treated as an intruder or usurper of the office, and that the county should be required to pay plaintiff what would have been due him as salary. While we must agree with the plaintiff that the judgment of the district court was void and a nullity in so far that probably no rights could be predicated upon it, yet it was a fact and circumstance in the case upon which persons could and did act. Was not the plaintiff himself justified in not attempting to resume the office, or to continue to exercise its functions, until the case had been finally decided? And, likewise, was not the board justified in believing that the judgment had created a vacancy, and in acting upon that belief at a time when there was no one assuming the responsibilities of the office?

We agree that mere possession of an office is not sufficient to make the incumbent a *de facto* officer. To constitute one a *de facto* officer he must have color of title, or his possession must be acquiesced in by the public generally. In this case, we are of opinion, these conditions existed. Morrison acquired color of title by reason of the district court's decision purporting to create a vacancy and by reason of his appointment by the board, a body authorized by law to fill vacancies. He was recognized as the incumbent by the public and the authorities generally. As above stated, if plaintiff recognized such a situation as existing, others are not to be blamed for doing so. Whether a legal vacancy existed or not, all the colors that the view presented to the eye at that time indicated that it did; everybody acted accordingly, and we are of opinion that Morrison became a *de facto* officer.

A void judgment is analogous to a constitutional act. It is held in *State Bank of Pender v. Frey*, 3 Neb. (Unof.) 83: "An unconstitutional act attaching territory to a county, accepted and acquiesced in, will suffice to render the acts of the register of deeds of such county, as to such territory, done before the law was declared unconstitutional, acts of a *de facto* officer."

Does the fact that the county board appointed Morrison make any difference as to the liability of the county to the plaintiff for his fees? We think not. It is argued that the basis of the rule touching what constitutes a *de facto* officer is protection of the innocent. That may be true. Ordinarily, and here, the taxpaying public are among the innocent. The public needs required that the office should be filled. The county board would be derelict in its duty if it failed to see that it was properly filled. When the trial judge had declared the office vacant, the board could not wait for the judgment on appeal before acting. In *Berryman v. Schalander,* 85 Neb. 281, we held: "A county board or board of county commissioners are clothed, not only with the powers expressly conferred upon them by statute, but they also possess such powers as are requisite to enable them to discharge the official duties devolved upon them by law."

If the board, acting as the agents of the county, had in bad faith used its official powers fraudulently to put one in office who was a mere intruder or usurper, and paid him the salary, the case would be different. In this respect the instant case is distinguished from *Warden v. Bayfield County,* 87 Wis. 181, relied upon by the plaintiff. No fraudulent act of the officials, acting as such, removed plaintiff from his office. That was done by the judgment of the court.

Forty-three days elapsed between the time of the decision of the supreme court and the time when the mandate, issued February 3, 1914, reached the district court of Buffalo county, when plaintiff was reinstated in his office. Under the decisions in *State v. Sheldon,* 26 Neb. 151, and *Horton v. State,* 63 Neb. 34, it appears that the judgment of the supreme court would not be final or officially known to the proper officers in Buffalo county, so that they would be required to execute the judgment, until the mandate was filed on February 5, 1914.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

WESTERN BRICK & SUPPLY COMPANY, APPELLEE, V. MID-WEST CONSTRUCTION COMPANY, APPELLEE; AMERICAN SURETY COMPANY, APPELLANT.

FILED MAY 5, 1917. No. 19459.

1. **Contracts:** CONSIDERATION. An agreement entered into without consideration is unenforceable.
2. **Appeal:** CROSS-APPEAL. "Parties to an action desiring to effect a cross-appeal in this court are required to file a brief of assignments in error within the time limited by statute for appealing." *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Reversed, with directions.*

Montgomery, Hall & Young, for appellant.

J. A. Gardiner, contra.

DEAN, J.

The Western Brick & Supply Company, hereinafter called plaintiff, began an action in the district court for Adams county against the Mid-West Construction Company, defendant, hereinafter called the Construction Company and the American Surety Company of New York, its codefendant, hereinafter called the Surety Company, to recover $916.93, that being the unpaid balance due from the Construction Company for building material sold and delivered by plaintiff to the Construction Company and used by it in the erection in Aurora of a building for Cass Brothers, a building for Mrs. A. V. Thomas, and for an addition to the Aurora Electric Light Company building. Plaintiff obtained judgment against both defendants for $916.93 and $90 that was allowed as attorney fees in addition to the amount of the judgment, to be taxed as a part of the costs in pursuance of section 3212, Rev. St. 1913. The Surety Company appealed from the judgment and

from the allowance of attorney fees. The three several building contracts between the Construction Company and its Aurora patrons were executed by the parties thereto in September, 1913. Shortly thereafter the Construction Company procured from its co-defendant, the Surety Company, three separate indemnifying bonds, wherein the Surety Company agreed to "indemnify the obligee against any loss or damage directly arising by reason of the failure of the principal to faithfully perform said contract." The only obligees named in the three respective bonds executed by the Surety Company are Cass Brothers, Mrs. Thomas, and the Electric Light Company.

The Thomas building was completed on November 1, 1913, the Cass building on December 1, 1913, and the addition to the Electric Company building sometime in February or March, 1914. The statutory time for filing subcontractors' liens against the Thomas building expired some time in January, 1914, and on the Cass building some time in February, 1914. The time for filing such lien against the Electric Light building would not have expired until April 12, 1914, but that is not material, because it is shown by the direct examination of A. H. Ferrens, secretary and treasurer of plaintiff company, and by the testimony of E. D. Bruce, its shipping clerk and bookkeeper, that $421.35 was paid to plaintiff on April 7, 1914, in full settlement of the unpaid balance due for all material furnished by plaintiff that was used in the Electric building at Aurora. There is no dispute in the record with respect to the fact of this payment. To the same effect is the statement of S. H. Griffen, assistant manager of the Surety Company in Nebraska, who testified that he made the payment of $421.35 on April 7, for and on behalf of the Construction Company, from money furnished him for that purpose by the Electric Company. Philip Potter, resident manager of the Surety Company, also testified that his company did not to his knowledge contribute anything to this payment. Mr. Griffen testified, in substance, that shortly before the payment was made, per-

haps the same day, he called at the office of the Aurora Electric Company with Joseph Neptune, superintendent of the Construction Company, and while there Charles P. Craft, president of the Electric Company, gave to them a check for $1,000, with directions to pay certain accounts from the proceeds of the check, among them being the $421.35 which was the balance due plaintiff for material used in the Electric Company building.

From the record it is evident that counsel is mistaken in its contention that "plaintiff could have filed a valid lien on the building and ground of the Aurora Electric Light Company for the sum of $427.33 in addition to the $421.35 paid by Mr. Griffen on April 7, 1914." Obviously so, because two of plaintiff's witnesses and one witness for defendant testified that the latter sum constituted a payment in full of the balance due for material furnished by plaintiff that was used in the Electric building.

Plaintiff contends that when S. H. Griffen, the agent of the Surety Company, called at its office at Hastings on April 7, besides paying them $421.35, he promised plaintiff that if it would forbear the filing of liens against any of the Aurora property erected by the Construction Company the Surety Company would pay the balance of the indebtedness owing by the Construction Company to plaintiff for material furnished by it that was used in the Aurora buildings.

It appears to us that plaintiff must be mistaken with respect to such promise having been made. It is scarcely reasonable that it should have been made. When the balance due for the material that was used in the Aurora Electric building was paid, no lien could have been filed on that building, and the record clearly shows that the time in which a valid lien might have been filed by plaintiff on the Cass and Thomas buildings expired long before April 7; and the promise, even if made, which the agent denies, was without consideration. Doubtless there was considerable talk between the parties at the time, and some remark made by the agent was perhaps construed

to be a promise. It remains that it was no fault of the agent nor of the Surety Company that plaintiff allowed the time to pass in which it might have protected itself from loss by filing liens against the Cass Brothers and the Thomas buildings.

Plaintiff relied for recovery, not only on the alleged promise of the agent of the Surety Company to pay the balance due for material furnished by it to the Construction Company, but also pleaded and argued that the Surety Company was liable generally on the surety bonds.

The trial court eliminated from the consideration of the jury any liability of the Surety Company to plaintiff on the indemnity bonds, and gave to the jury this instruction: "The court instructs you, gentlemen of the jury, that, under the pleadings and the evidence, the sole question for your determination in this case is: Did the defendant, the American Surety Company, agree with the plaintiff that if plaintiff would not file any liens against the buildings constructed by the Mid-West Construction Company, and the lots upon which they were located belonging to the Cass Brothers, the Thomases, and the Aurora Electric Light Company, the American Surety Company would pay what was due to the plaintiff for the materials so furnished the Mid-West Construction Company?" After reading the court's instruction with respect to the "sole question" for its determination, there could remain no doubt in the mind of the jury as to the meaning of the court in the premises.

The Surety Company argues that the claim to recover on the surety bonds is eliminated by the judgment of the trial court, and that, plaintiff having failed to take a cross-appeal on that feature, the adjudication of the trial court is final on the question of its liability on the bonds generally. The contention of the Surety Company must be sustained. Rule 18b (Supreme Court Rules, 94 Neb. XV) provides: "On Cross-Appeal.—Coparties of appellants may join in the appeal or take cross-appeal, or any appellee may take cross-appeal, by filing with the clerk of

this court, within thirty days before the time fixed as rule day, a præcipe, which shall designate the name of such party as cross-appellant, and the names of all adverse parties as cross-appellees." *Anderson v. Griswold,* 87 Neb. 578. It is said in *Nebraska Hardware Co. v. Humphrey Hardware Co.,* 81 Neb. 693: "Parties to an action desiring to effect a cross-appeal in this court are required to file a brief of assignments of error within the time limited by statute for appealing." Plaintiff having failed to comply with the rule that has been invoked by the Surety Company, which requires that a cross-appeal be perfected in this court, we are compelled, in obedience to an orderly observance and enforcement of a salutary rule of long standing, to treat the allegation of plaintiff with respect to the alleged liability of the Surety Company generally on the indemnity bonds as an incident that has been finally closed in the trial court. The sole question tried and submitted to the jury in that court is plainly stated in the instruction now complained of by plaintiff, and hence in the present state of the record it is the only question that can properly be reviewed here.

The judgment of the district court is reversed, with directions to dismiss the action with costs as to the defendant American Surety Company.

REVERSED.

SEDGWICK, J., not sitting.

MINNIE MARTINS, APPELLEE, V. SCHOOL DISTRICT ET AL., APPELLANTS.

FILED MAY 5, 1917. No. 19470.

Schools and School Districts: TUITION: INJUNCTION. Minnie Martins, plaintiff, a minor child, by her next friend, enjoined the defendant school district from refusing to permit her to attend its public school without paying tuition. The testimony examined, discussed in

the opinion, and *held*, that plaintiff was qualified to attend the public school in the defendant school district without the payment of tuition on the ground of residence and on the ground that a married sister, resident in the district and with whom plaintiff lived, stood *in loco parentis* to her.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Affirmed.*

A. M. Emley and *A. R. Oleson,* for appellants.

Hugo M. Nicholson, contra.

DEAN, J.

On October 8, 1914, Minnie Martins, who was then 17 years of age, began an action in the district court for Cuming county by her next friend, John Richmond, plaintiff and appellee, to enjoin the officers of School District No. 30 of Wisner, defendants and appellants, from denying to her the privilege of attending the public school without payment of tuition. On final hearing a perpetual injunction was granted, and plaintiff's application for permission to attend the school without the payment of tuition was granted. The defendants have appealed.

Plaintiff is a sister of John Richmond's wife, and for nearly two years before the action was begun had made her home with the Richmonds at Wisner. She argues that her sister stands in the place of a parent to her, and besides maintains that she is a resident of Wisner, and is therefore entitled to attend the public school without charge on either ground. She attended the school of the defendant district throughout the 1913-1914 school year. No tuition was demanded until September, 1914, when a demand was made that $18 tuition be paid for the school year that was past. The demand was not complied with, because it was contended that her permanent home was at her sister's, and also because of plaintiff's claim of residence in the school district. On October 5, 1914, the district by resolution prevented her further attendance until the $18 tuition for the 1913-1914 school year was paid. Then, or at about that time, the board by resolution fixed

the fee for nonresident pupils at 50 cents a week, and required all nonresident pupils to comply therewith. To this demand plaintiff also refused a compliance for the same reason that she refused to pay the charge of $18.

Defendants argue that plaintiff's sister nor any other person stands *in loco parentis* to her at Wisner, and they contend that she is a nonresident of the district. They point out that John Richmond, in pursuance of notice, appeared before the board and promised that all tuition payments that were demanded would be paid, but that he later repudiated his agreement. Mr. Richmond in explanation frankly admits the most of defendants' contention on this point, but he testified that at the time of his talk with the board he had not then been informed about an arrangement that had long theretofore been made between his wife and plaintiff's father, at or very soon after the death of plaintiff's mother, which provided in effect that the father, in part owing to his bereavement, had placed her in charge of Mrs. Richmond to care for and to educate. When asked if, on discovery, he ratified his wife's act in the premises, he promptly answered that he did.

Defendants argue that Mr. Richmond should not, after litigation is begun, be permitted to change his ground and mend his hold. The answer to this contention is that the board was notified by him of his change of ground before any action was taken by it, and besides, in the absence of authority or of ratification by plaintiff, he could not bind her by any promise or agreement he might make, and the record shows he was without such authority, and it is not shown that she ratified his unauthorized act. Plaintiff was emphatic in her testimony that she never authorized John Richmond to make any statement to the board in her behalf about the payment of tuition, and that she never knew of his talk with the board on this subject until about the time suit was begun. The real issue in the case is whether Minnie had a right to go to defendants' school

without the payment of tuition. To this all else is subordinate. If Mrs. Richmond stood in the place of a parent to her she had that right or if plaintiff was a resident in good faith of the district she had a right to attend its public school. In either event, in view of the surrounding circumstances, John Richmond's promise or attitude or change of ground has nothing to do with a proper determination of the case.

The case was tried on June 8, 1915. Her mother had been dead eleven years. Her father and stepmother, to whom at that time he had been married about eight years, lived at Scribner, which had then been their residence for many years. During all of the time that plaintiff lived with her sister she had not been at her father's home, distant about 30 miles, to exceed perhaps three times, and then for only a few hours between trains, and never remaining there over night. It is in evidence that her sister furnished plaintiff with practically all of her clothing and with a little spending money ever since her mother died, and for all of the time that plaintiff was in her home at Wisner she furnished her with food, lodging and clothing free of expense to her father. Besides attending school, plaintiff worked in the telephone office at Wisner, where Mrs. Richmond's husband was manager. For this she received wages, which she testified she was saving to be used by her in obtaining an education. It does not appear that she went to Wisner mainly to go to school, but that her school attendance there was merely an incident in the life of a motherless child.

That plaintiff's father had given to Mrs. Richmond the entire control of plaintiff nearly two years before this action was begun is established by the testimony of Mrs. Richmond, of Minnie, and of her father. Plaintiff testified, too, that her father told her at Scribner, shortly before she went to her sister's to live, that she must make her own living or leave home. Her father never gave her any money or clothing after she left his home, and he tes-

tified that his daughter furnished Minnie with nearly, if not quite, all her clothing ever since her mother died. Mr. Martins testified that on one occasion he went to Wisner for the purpose of having Minnie return with him to Scribner to assist in the care of her stepmother, who was ill, but that Mrs. Richmond would not let his daughter go. He said her refusal was based in part on the ground that he had formerly relinquished control of Minnie to Mrs. Richmond, and that he acquiesced in her refusal to let her return with him for that reason, and that he returned to Scribner alone. Defendants point out that the testimony of Mr. Martins at the final hearing differed from an affidavit and other of his testimony at an earlier period of the controversy. When it is remembered he speaks a foreign tongue and that a part of the former testimony was taken through the medium of an interpreter, the apparent discrepancy loses much of its force as a challenge of its probative value.

Section 6800, Rev. St. 1913, among other things, provides that the school board may "make such rules and regulations as they may think needful for the government of the schools and for the preservation of the property of the district, and also to determine the rates of tuition to be paid for nonresident pupils attending any school in the district except nonresident pupils attending the high school without charge." Statutes pertaining to our public schools should be liberally construed to the end that all persons of school age may enjoy their privileges. A rule of a board of education that would prevent plaintiff or any person similarly situated from attending its public schools cannot be enforced. From the record it clearly appears that plaintiff is qualified to attend the public school at Wisner. *State v. School District,* 55 Neb. 317; *State v. Selleck,* 76 Neb. 747. Solicitude for the education of its youth has always been characteristic of Nebraska. It is a settled policy of the state that every person of school age shall have an opportunity to attend its free schools. Section 6, art VIII of the Constitution, follows:

"The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." The district court rightly interpreted the constitutional provision pertaining to this subject and the intent of the laws enacted in pursuance thereof.

The judgment of the district court is right, and is in all things AFFIRMED.

SEDGWICK, J., not sitting.

STATE, EX REL. JAMES GROVES ET AL., APPELLANTS, V. SCHOOL DISTRICT OF OMAHA ET AL., APPELLEES.

FILED MAY 5, 1917. No. 19983.

Schools and School Districts: NONRESIDENT PUPILS: STATUTE. In a proceeding to compel the Omaha school district to admit qualified nonresident pupils to its high school upon payment of the fee provided by statute, *held*, that the school district was not justified in refusing to admit relators where it was not shown that the district was unable to furnish such instruction at the statutory tuition fee, excluding the cost of "constructing or renting additional buildings, hiring extra teachers, or" showing some "other reasonable cause" for such refusal. Rev. St. 1913, sec. 6813, subd. 6.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

E. R. Leigh, for appellants.

Carl E. Herring, contra.

DEAN, J.

In this action the relators, appellants, pray a peremptory writ of mandamus against respondents, to compel the admittance of certain applicants to free high school privileges in the high schools of the Omaha school district, by

virtue of the provisions of the free high school law. The school district refused admittance except on payment of $57 a year tuition. The relators were ready to pay $1 a week tuition, the amount provided by the statute, or $38 a year. The case involves the constitutionality of the high school law as amended in 1915 (Laws 1915, ch. 119), which provides for attendance of nonresident pupils in the high schools of the state on payment of $1 a week tuition.

Under the provisions of our Constitution relating to equality in taxation, any law imposing an unfair or unequal burden of taxation upon one school district for the benefit of another would be unconstitutional. This was held in *High School District v. Lancaster County,* 60 Neb. 147. Afterwards, in *Wilkinson v. Lord,* 85 Neb. 136, we held that the court would not assume without proof that a fee fixed by law was not compensatory.

The law under consideration provides that such school district as may be "unable to furnish accommodations to nonresident pupils, without constructing or renting additional buildings, hiring extra teachers, or other reasonable cause, may refuse admission to any or all such nonresident pupils." Rev. St. 1913, sec. 6813, subd. 6. It was evidently the view of the legislature that, since such expenses would be incurred in any event, if no additional expense was imposed upon the receiving district for teacher's wages or for buildings and their upkeep, the sum of $1 a week would cover all additional cost. The school district is abundantly fortified against imposition by reason of the statutory right that is given to it to deny admittance when its school accommodations and facilities are insufficient to give proper care and attention to its own resident pupils as well as to those seeking admittance from another school district.

The respondent school district admits that it has at present facilities for additional pupils, and the evidence shows that the statutory fee of $1 is fully compensatory for the additional expense which would be incurred by reason of the proposed attendance of nonresident pupils.

The respondent, therefore, should be required to admit the relators to the privileges of its high schools.

The judgment of the trial court is reversed and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

REVERSED.

SEDGWICK, J., not sitting.

CORNISH, J., dissenting.

Under democratic institutions, it ought never to happen that one community should be required to bear the burdens of another. Especially is that true where the burden involves taxation, and under a Constitution like ours where its framers undertook to provide every possible safeguard which they thought necessary to secure equality. This question is discussed at length in *High School District v. Lancaster County,* 60 Neb. 147, where Judge Norval came to the conclusion that any attempt at fixing an arbitrary sum which one school district must pay another for educational privileges must fail, because, in the nature of the case, the sum arbitrarily fixed would be either too great or too little, putting an unfair burden on one district or the other, to be raised by taxation. I cannot help but think that this is true. I agree that the opinion is in accordance with the rule laid down in *Wilkinson v. Lord,* 85 Neb. 136, and that the fee is compensatory in the sense urged. The trouble is, its reasoning proves too much. If it is lawful to eliminate overhead expenses, as is done in this case, then the amount which the outlying district might be required to pay might become merely nominal; $5 a year might cover it. Then a situation could arise wherein the community supporting the school would pay by taxation $100 a year per pupil for its own resident pupils and be forced to give to nonresident pupils the same privileges for $5 a year, which, while it would meet the additional expense for the nonresident pupil, would be far less than the actual cost, and less than what I think can be fairly considered as compensatory.

An arbitrary charge should not be forced upon the district. I doubt if there is a high school district in the state not ready and willing to accept additional pupils, when it has room, at a reasonable charge. In the instant case, the evidence shows that the cost per pupil in one school is $77.31 a year; in the other, $119.39. The district offered to take the additional pupils at $57 a year, which was reasonable. Section 6944, Rev. St. 1913, provides a way by which the school districts can agree upon what is fair compensation. This the district in which appellant resides would not consent to, although all of the other districts surrounding Omaha were willing to pay the $57.

Educational privileges are no doubt important to the future welfare of the state, but not more so than the preservation of those principles of equality embodied in the Constitution, or the necessity of abiding by them until the Constitution is changed.

SAMUEL ASKEY, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED MAY 9, 1917. No. 19055.

1. **Railroads:** CROSSINGS: DUTY OF TRAVELER. It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear; and if he fails without reasonable excuse to exercise such precautions he is guilty of negligence.
2. ———: ———: NEGLIGENCE. It is the duty of one approaching in an automobile a railroad crossing with which he is familiar, where his view is obstructed until he gets within a short distance of the railroad track, to keep his car under control and drive at a speed which will enable him to stop in time to avoid a collision after discovering a train. A speed which prevents such control under the circumstances is negligence as a matter of law.
3. ———: ———: CONTRIBUTORY NEGLIGENCE. Failure of the railroad company to ring the bell or blow the whistle as the train

approached the crossing, even though it may have been negligent, would not make the railroad company liable for the death of the automobile driver in a collision at the crossing, if he recklessly failed and neglected to have his car under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track, but recklessly failed and neglected to do so, whereby there was a collision.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Reversed.*

Byron Clark, E. E. Whitted and *J. L. Rice,* for appellants.

John Everson and *J. G. Thompson, contra.*

HAMER, J.

This case comes here on appeal from a judgment rendered against the defendants in the district court for Harlan county. The plaintiff, as administrator of the estate of Thomas Askey, deceased, brought this action against the Chicago, Burlington & Quincy Railroad Company and Robert Cole, for the alleged negligent killing of Thomas Askey, plaintiff's decedent. A trial resulted in a verdict in favor of plaintiff for $5,000, and judgment thereon.

The only allegation of negligence contained in the petition in the instant case reads: "Plaintiff alleges that the defendants were guilty of gross carelessness and negligence in causing the death of said Thomas Askey, in this: Said train was running at a high speed, and no warning was given of its approach to said crossing of the highway, either by sounding the whistle or ringing the bell. And the track of said company, from a point about 300 feet to the west of said crossing to a point east of said crossing, curves to the south; and trees have been permitted to grow upon and over the north side of the right of way of said company between the curve and the crossing, so that deceased and other persons going south on said highway and crossing the track of said company from the north cannot see the track of said company except to the curve,

and said trees and undergrowth upon said right of way wholly obscure the trains approaching from the west until within about 20 or 30 feet of the rails of the track of said company."

The appellant contends that the evidence is insufficient to sustain the verdict. It shows that the accident occurred on June 18, 1913, at a wagon road crossing over the track of the railroad company west of Oxford, in Furnas county, Nebraska; that the wagon road in question passes over the track from the north to the south, and that the railroad at the crossing follows a practically east and west course. On the day in question the automobile being driven on this road from the north by the plaintiff's decedent was struck by an east-bound passenger train shortly after 6 o'clock in the evening, and the deceased was killed. At about 1 o'clock in the afternoon of the day when the accident occurred the deceased, together with his brother, Roy Askey, Frank and Ed Morris, and Charles Morris, went to Arapahoe, a town about 14 to 16 miles west of the home of the deceased. Arriving at Arapahoe, they went directly to a saloon, and were in and about the two saloons of the town the greater share of the time that they were there, probably about four hours. It is agreed that they had been drinking, but whether the deceased was intoxicated at the time of the accident is disputed.

It is contended that the bell was not rung nor the whistle sounded as the train approached the crossing. Upon the allegations of negligence on the part of the defendant, the evidence seems to be conflicting, and, the jury having found for the plaintiff, we must, for the purpose of this opinion, consider that the defendant was guilty of negligence which would have justified a recovery, unless the plaintiff's intestate was guilty of contributory negligence. We will therefore confine ourselves to that question.

The party left Arapahoe about 5 o'clock in the afternoon. They took with them three cases of beer and some lunch. They drove east upon a public road which runs

along the south side of the railroad, crossed the railroad at the crossing in question, drove north to the place occupied by Ed and Charles Morris, and left them there and a case of beer, turned around, and then, with decedent driving, with Frank Morris sitting beside him, and Roy Askey in the rear seat, they started south to cross the railroad, and thence to go west to Thomas Askey's home. In attempting to cross the track at this time, the automobile was struck by the locomotive, and Thomas Askey and Roy Askey were instantly killed. Frank Morris survived. Whether Thomas Askey was drunk or sober, he was required to exercise ordinary prudence at the crossing in either case.

West of the crossing, but not upon the right of way, is a large tree which overhangs the right of way. South and west of this had been a tree growing in the bottom of the creek's bed and distant from the track about 20 feet. This tree had been cut off, and is referred to in the testimony as the "stumped off" tree. Sprouts were growing from this tree and reached a little above the banks of the creek. West of this point the railroad curves to the south and goes in a southwesterly direction, and a train coming from the southwest could be seen from the crossing, or a point north of it not exceeding 48 feet, for a long distance, perhaps two or three miles. There was a dry creek that made a bend upon the right of way. There was a deep "hole" in the dry creek, and shrubbery and brush were growing out of it. It seems that the "hole" was only the bed of the creek. This dry creek came down in a southeasterly direction toward the railroad until it came in contact with the right of way, when it turned and went northeast. The brush which grew out of this dry creek was about two feet above the level of the rail. There was a stump of a tree in the bottom of the creek from which some sprouts had grown up. The railroad, following it west from the crossing, seems to have curved southwesterly at a distance of a little more than 300 feet west of the crossing. A train coming on the track from the west toward the crossing

might have been obscured by the tree and by the brush as to a person on the line of the crossing and more than 48 feet north of the crossing, but after the automobile, which was going south, got within 47 or 48 feet of the railroad track a person could see along the track in a westerly direction for a distance of from 300 to 350 feet, and by looking southwesterly along the track a train might be seen two miles away or further. The automobile was within 28 feet of the track when it seems to have slid and to have changed its direction so that it ran a little more westerly. This suggests with great force that the automobile was running so fast that it ran onto the track in spite of the driver. All the witnesses agree that the track was open to view toward the west for a distance of 300 feet or more when entered by the roadway at the north side, and from a point not to exceed 48 feet north of the crossing; also that the country is level and the track slightly higher than the surrounding country. Frank Morris, the surviving member of the party, testified on his direct examination: "A. Well, you can stand inside of the right of way, I think about three feet, and you can see a train when it is about 300 feet west of the crossing." The automobile was struck squarely in the center. The speed of the train was shown by the speed recorder to be 37 miles an hour. The deceased lived in the neighborhood. He had been over the crossing itself four times on the morning of the day that he was killed. Approaching the crossing approximately the same rate of speed was maintained that had been maintained elsewhere on the road. There was no slowing down. The evidence showed that 28 feet north from the north rail there were marks in the road showing that the automobile had skidded, and that from that point on toward the track it had not followed the usual traveled course, but had turned westerly and had gone on to the crossing planks near the west side. If the curved track of the automobile in the road indicates that at this point the brakes were applied to the automobile and that deceased endeavored to stop, then the accident occurred

because the deceased approached the crossing at a rate of speed too high to permit him to stop after he saw the train. He ought to have been able to stop in less than 28 feet. These curved automobile tracks are significant that he tried to stop, but if he did not attempt to stop then he must have driven about 47 or 48 feet from the point where the train might first have become visible to him clear up to the track without making an effort to stop. The train would, at the rate of 40 miles an hour, cover 300 feet in a little more than five seconds, consequently, it was in plain view at a point on the highway within 47 or 48 feet of the place of collision for fully five seconds, and perhaps six, before reaching the crossing, which offered deceased ample time to discover the danger and to stop if he had endeavored to do so, and had had his car under control. The speed of his car must have prevented him from stopping.

The witness, Frank Morris, in his testimony on behalf of the plaintiff, described the accident as follows: "A. Well, as we started to come up (to) the right of way, first, I looked down the track east. We had some crackers there, and I reached down and picked up the crackers, and I was looking right west like this (indicating), and just as I raised up, Tom says, 'My God, there is a train!' and just then I seen it; just as he said that I seen the train. The last I seen of Tom he was reached over like this (indicating attitude), and I was jumping out of the car."

"It is the duty of such traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. He must look, where, by looking, he could see, and listen, where, by listening, he could hear." *Rickert v. Union P. R. Co.*, 100 Neb. 304. The evidence wholly fails to show the performance of this duty. During all the time the train was moving eastward from a point 350 feet west of the crossing, or thereabouts, it was in full view of the occupants of the automobile if they had looked.

It is the duty of one operating an automobile and approaching a crossing with which he is familiar, and where

the view is obstructed until near the track, to drive his car at such speed that he can stop it after discovering a train in time to avoid a collision. The high speed which prevents such control at a railroad crossing is negligence as a matter of law. *Gage v. Atchison, T. & S. F. R. Co.*, 91 Kan. 253; *Corley v. Atchison, T. & S. F. R. Co.*, 90 Kan. 70; *Earle v. Philadelphia & R. R. Co.*, 248 Pa. St. 193. This rule springs from the rule which recognizes a railroad crossing as a place of danger and requires one, knowing he is approaching it, to look and listen before attempting to cross. Control of the vehicle is essential. The decedent either did not look for a train at a time when he could have saved himself as he was approaching the crossing, or he was driving at a rate of speed which made his discovery of the train unavailing. The failure to do these things is more than a slight negligence as a matter of law. *O'Toole v. Duluth, S. S. & A. R. Co.*, 153 Wis. 461; *Dohr v. Wisconsin C. R. Co.*, 144 Wis. 545.

In *Gage v. Atchison, T. & S. F. R. Co.*, 91 Kan. 253, the court said: "Ordinary prudence requires him to control his car so that he could use his faculty of sight near the track where it would be of most benefit to him, and so that he could stop before going on the track if a train should appear within the distance he was able to see."

In *Avery v. New York, O. & W. R. Co.*, 205 N. Y. 502, the trial court was requested by the defendant to charge the jury: "It is the duty of the person riding a bicycle upon a highway, in approaching a railway crossing, to keep the bicycle under complete control and be prepared to stop." This request was refused, and the court of appeals said: "I think the ruling was grave error. * * * The rider of a bicycle should have it under full control." The opinion cites *Cullen v. Delaware & Hudson Canal Co.*, 113 N. Y. 667, *Wallace v. Central V. R. Co.*, 138 N. Y. 302, and other cases.

Applying the rule here laid down to the instant case, the decedent should have looked and listened, and should have had his automobile under control, and this he should

have done if neither the bell was rung nor the whistle sounded. Also along the same line are the following: *Glick v. Cumberland & W. E. R. Co.*, 124 Md. 308; *Northern P. R. Co. v. Tripp*, 220 Fed. 286; *Turck v. New York C. & H. R. R. Co.*, 95 N. Y. Supp. 1100.

In the sixth instruction the court said: "If from the evidence in this case you find that Thomas Askey on approaching the crossing did not look and listen for the train, or exercise such precaution as a person of ordinary prudence and judgment, under similar circumstances and conditions as are shown by the evidence existed at the crossing in question, would use, such facts would be evidence of contributory negligence, and if from the evidence you find that Thomas Askey was guilty of contributory negligence, and that such contributory negligence was the approximate and efficient cause of his death, then and in that event the plaintiff could not recover, and your verdict should be for the defendants."

In the above instruction the jury are, in effect, told that one approaching a railroad crossing is not necessarily required to look and listen. The instruction as it was given was clearly wrong. It told the jury that Thomas Askey might look and listen for the train, or that he might exercise such precaution as a person of ordinary prudence and judgment would exercise under similar circumstances. It was the duty of Thomas Askey on approaching the crossing to look and listen for the train, and exercise such precaution as a person of ordinary prudence and judgment under similar circumstances and conditions would exercise.

In *Hunt v. Chicago, B. & Q. R. Co.*, 95 Neb. 746, it is held: "The rule that, if negligence on the part of a person injured contributed to the injury, he is not entitled to recover therefor applies as well where the injury is to plaintiff's property as to where it is to his person, and in cases of contract as well as those of tort."

The court refused to give instruction No. 12, requested by the defendants, as follows: "The omission of a rail-

road company to sound the whistle or ring the bell of its engine when approaching a public crossing does not of itself make out a case of negligence against the railroad company or those operating the engine; and, even if the whistle is not sounded and the bell not rung, yet if the traveler on the highway by exercising ordinary care in looking and listening for the train, or by traveling at a prudent and proper rate of speed, could prevent a collision, but does not do so, he cannot recover for injuries received in the collision, notwithstanding the whistle was not sounded or the bell not rung."

The district court failed to properly submit to the jury the question of decedent's contributory negligence.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., dissents.

MT. MORIAH LODGE NO. 57, A. F. & A. M., APPELLEE, V. OTOE COUNTY, APPELLANT.

FILED MAY 9, 1917. No. 19291.

1. **Taxation: EXEMPTION: PROOF.** Facts which render property exempt from taxation under section 6301, Rev. St. 1913, must be affirmatively established. *Watson v. Cowles*, 61 Neb. 216.

2. ———: ———: **EVIDENCE.** Evidence examined, and *held* insufficient to show that the property of plaintiff lodge is exempt from taxation. *Plattsmouth Lodge v. Cass County*, 79 Neb. 463, distinguished.

APPEAL from the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed, with directions.*

W. F. Moran, for appellant.

E. F. Warren and *S. P. Davidson, contra.*

MARTIN, C.

Mt. Moriah Lodge No. 57, Ancient Free and Accepted Masons in Nebraska, was the owner of a second story of a building located in the village of Syracuse, Nebraska, and was also possessed of a limited supply of furniture and paraphernalia used in its lodge work. The authorities taxed this property for the year 1913. The plaintiff paid the tax under protest, and thereafter brought suit against the county of Otoe to recover said taxes. A jury was waived, and the court rendered judgment for the plaintiff for the full amount of the tax on the ground that said property is exempt under section 6301, Rev. St. 1913. The defendant county appeals to this court, and asks a reversal, contending that this property is not used exclusively for charitable purposes, and that the decision is wrong for that reason. Cases are cited wherein it is held that "a Masonic lodge is not a charitable benevolent institution." *City of Bangor v. Rising Virtue Lodge,* 73 Me. 428; *Morning Star Lodge v. Hayslip,* 23 Ohio St. 144. In the case of *Watson v. Cowles,* 61 Neb. 216, this court held that the taxes would have to be paid on the evidence that a part of the building was used for residental purposes and a part for school purposes, and that the plaintiff must show affirmatively the facts that render his property exempt from taxation. In the case of *Y. M. C. A. of Omaha v. Douglas County,* 60 Neb. 642, that portion of the building used for business purposes was held not exempt from taxation. This court also held in *Royal Highlanders v. State,* 77 Neb. 18, that the mere fact that an organization is carried on not for profit does not of itself exempt it from taxation. The trial court in the decision of the case at bar no doubt was governed by the decision of this court in *Plattsmouth Lodge v. Cass County,* 79 Neb. 463. The defendant insists that this case cannot be controlling for the reason that it was decided upon a stipulation of facts from which the Plattsmouth Lodge was declared to be an organization conducted exclusively for charitable and benevolent purposes. In that case the syllabus is: "Under the agreed

statement of facts in this case the property of Plattsmouth Lodge No. 6, A. F. & A. M., is not subject to taxation for the year 1905." Judge Letton concurred in the conclusion, saying: "Of course, if all the property of the lodge is used exclusively for charitable purposes, as the stipulation recites, it is also exempt, but it would have been much more satisfactory if the case had been submitted upon testimony." A Masonic lodge may have property which is devoted exclusively to charitable purposes, and under the stipulation between the parties agreeing to that proposition as stated in the syllabus, the property was held to be exempt.

In order to determine whether the case at bar is controlled by the *Plattsmouth Lodge* case, it is necessary to ascertain the character, object and purpose of the plaintiff lodge as shown by the evidence. The property assessed is a hall, being the second story of a brick building located upon a part of lot 6, block 15, in the village of Syracuse, Otoe Couty, Nebraska, the lower story of said building being used and owned by the First National Bank of that village. The lodge also owns the furniture and paraphernalia used in its lodge ceremonies. The second floor of said building consists of one large room, two anterooms, and two medium sized rooms which are used by plaintiff lodge. The lodge is supported by annual dues of $5 from each member and the fees for doing degree work which are charged the candidates and placed in the treasury of the lodge, a portion of which goes to the support of the Grand Lodge and the Masonic Home located at Plattsmouth, Nebraska, and a portion is used for charitable purposes, being distributed by three officers who constitute a standing committee on charity. The expenses of the local lodge are for fuel, light, cleaning of the hall, and work of that kind. These funds are confined largely to helping needy members of the order, not necessarily those who are members of the local organization, but those who have been such. The Eastern Star also uses the lodge hall for its meetings. It is an organization composed exclusively of the wives,

mothers and sisters of Master Masons, but the evidence shows that they had the use of the hall without any expense whatever to them, and that the lodge proper received no compensation whatever therefor. The plaintiff lodge has no way to get any revenue and obtains no income from any source except donations, the annual fees paid by each member, and the initiation and degree fees paid by candidates. The evidence of one witness also shows that the object of the lodge's charity is not limited to brother Masons and their families in distress, but that assistance, if necessary, may be rendered to any one with the approval of the lodge. This witness also swore that very little assistance had been necessary in the last two or three years, but that the lodge had helped the Masons who were caught in the cyclone at Berlin, Nebraska. This record also shows that the lodge inculcates in its members principles of morality, temperance and charity. It is thus made plainly to appear that the plaintiff lodge devotes a portion of all the funds which are derived from its members to charity, to helping the needy members and families of the same, and also to maintaining the Masonic Home at Plattsmouth. All the rest of its revenue it uses in its local work and in helping the Grand Lodge to maintain the machinery which accomplishes these purposes. Several witnesses testified that the money of this lodge was received in annual dues of the members, $5 each, and in membership dues when they were admitted. Two dollars of the $5 annual dues was sent to the Grand Lodge of the state, $1.50 for the benefit of the Grand Lodge, and a half dollar to go to the Masonic Home. The only direct and explicit testimony as to what part of the money of the lodge was spent for charitable use is this 50 cents of the $5. What was done with the other $3 is explained by the simple statement of the witnesses that it is "used for lodge purposes exclusively." One of plaintiff's witnesses says: "A dollar and a half of that goes to the Grand Lodge, and the other three and a half is retained by the local treasurer for local lodge purposes. Q. Now, how much, if you know, if any, of that dollar and a half which

you send to the Grand Lodge is appropriated or used for the Masonic Home? A. Fifty cents of that goes to the support of the Masonic Home." The local lodge uses some other money for charitable purposes, but there is no direct evidence as to what proportion is so used. Another witness was asked: "Q. For what purposes are the fees used? A. Well, to pay the expenses of the lodge—whatever expenses are incurred. Q. Anything else? A. Well, if there is anybody needs any help we help them; give them money." So that the amount they devote to charity is very indefinite; the most of it, according to the evidence, is used for purposes other than charitable purposes. Therefore it seems to us that the *Plattsmouth Lodge* case is distinguishable from, and is not decisive of, this case. The rule of course is that all property is to be assessed, and so, unless it can be clearly shown that a certain property is specifically exempted from taxation, it must be held to be liable.

Inasmuch as the plaintiff failed to show that its property is used exclusively for charitable purposes so as to come within the constitutional and statutory exemptions, the case should be reversed and judgment directed against the plaintiff.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, and the trial court is directed to enter judgment against the plaintiff, and this opinion is adopted by and made the opinion of the court.

REVERSED.

HOWARD MCMASTERS, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED MAY 19, 1917. No. 19341.

1. **Municipal Corporations:** DEFECTS IN STREETS: NOTICE. Section 4583, Rev. St. 1913, requiring written notice of defective public

streets to be filed with the city clerk five days before the occurrence of the injury complained of, has no application when the defects complained of were open and obvious and existed at the time the city opened the street to public travel, without guarding or warning against them.

2. ———: ———: NEGLIGENCE: QUESTION FOR JURY. Where plaintiff was injured by his horse becoming frightened and plunging down a declivity into a creek bed in the street, which the city left unguarded when it opened the street to the public, the question of negligence is for the jury.

3. Evidence examined, and *held* to support the verdict.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

C. Petrus Peterson, Charles R. Wilke and *George W. Berge,* for appellant.

E. P. Holmes and *Guy C. Chambers, contra.*

MORRISSEY, C. J.

While plaintiff was driving a horse and buggy along Twenty-third street in the city of Lincoln, the horse became frightened and plunged down a declivity into a creek bed in the street, and plaintiff suffered injuries. On the trial he was awarded a judgment for $2,000, and defendant has appealed.

Twenty-third street was 100 feet wide at the point where the injury was received. Antelope creek made a sharp curve and swung out to about the center of the street and ran for some distance parallel with the street. The city had failed to erect any guards or barriers to protect travelers from driving into the channel.

Defendant invokes the provisions of section 4583, Rev. St. 1913, which provides that cities of the first class shall be exempt from liability for damages or injuries suffered or sustained by reason of defective public streets unless actual notice in writing of the defect shall have been filed with the city clerk at least five days before the receipt of the injury. No notice of this kind had been given, and the trial court instructed the jury: "That such notice would

be unnecessary, if you believe from the evidence that any dangerous condition of said street was the result of the action of said city in establishing said street in the manner and under the conditions as shown by the evidence." If section 4583, Rev. St. 1913, applies, no recovery can be had; but appellee contends that it does not apply where the city causes the defect in the street, or leaves the street in a defective condition when laying it out.

In *Updike v. City of Omaha*, 87 Neb. 228, 237, it was held that this provision of the statute has no application to defects caused by the city itself in negligently constructing a sewer in one of the streets of the city. In the body of the opinion the section is discussed: " 'What was the purpose of requiring this notice? Clearly, to direct the attention of the proper officers of the city to the fact that at a particular point on one of the public highways of the city there exists at the time a condition in the public highway which renders the street unsafe and dangerous for public travel, a condition likely to result in injury to some traveler on the highway. The purpose of this notice was to enable the city to prevent accidents by repairing or guarding the defect.' This is undoubtedly the real purpose of the legislation. The city had been held liable in some cases in which it was uncertain whether the officers of the city had notice of the defect complained of. It was regarded as a question of fact for the jury to determine whether they knew, or the circumstances were such that with reasonable diligence they must and ought to have known, of the dangerous condition of the streets. And having apparently more regard for the financial interests of the city than for the rights of strangers or danger to the citizens, the legislature purposed to change this. There should no longer be any liability on the part of the city unless its officers actually knew of the defect. It was not presumed that the officers of the city would themselves create the defect. The statute was not necessary nor intended for such a contingency. To so construe the statute would be to hold that the intention of the legislature was to bar a proportion of the claims against the

city without regard to the justice of the claims or the conditions under which they arose." (p. 239) "If the act causing the dangerous condition is done by the officers of the city themselves, the knowledge of its existence is inherent in the act. To suppose that the legislature intended that they must be notified of their own act is to question the judgment and motives of the lawmakers."

The only essential difference between the facts in *Updike v. City of Omaha* and the instant case is that in the former case the city itself negligently constructed the sewer. In the instant case it did not make the excavation into which plaintiff fell. But it did lay out and maintain the street, and in doing this, through its officers and agents, it had notice and knowledge of the topography of the earth. It knew the dangerous condition that existed. It opened the street for travel and impliedly invited the public to use it as a thoroughfare. There can be no difference in principle between the act of the city in negligently laying a sewer and in negligently leaving open and unguarded a pitfall which nature made, when that pitfall existed at the time the street was laid out, and had existed, as said in defendant's brief, "from time immemorial."

Defendant further insists that no negligence has been shown. The distance between the lot line on the east side of the street and the bank of the creek on the west side of the street was 41 feet, and the traveled roadway was about 15 feet in width. The plaintiff was traveling on the right-hand side of this roadway, the side next to the creek, when his horse suddenly shied and plunged down the declivity. He testifies that the wind was blowing, that he does not know what caused the horse to shy, but gives it as his opinion that he might have been frightened by blowing paper. It must be admitted that the roadway was sufficient in width, and that had the horse remained on the grade the road would have carried him safely. Was the city chargeable with negligence in failing to fill the pit or to erect suitable barriers?

The court instructed the jury: "It was the duty of the city to use reasonable care to make the highway safe for travelers, and if you believe from the evidence that in the exercise of such reasonable care to make said highway safe, at the point where it is alleged that plaintiff fell into said ditch, or creek bed, some guard or protection was necessary to prevent travelers from falling into the ditch, and if you find that the city failed to do this, and was negligent because thereof, then you are instructed that if you find from the evidence that because of such negligence, if such you find there was, the plaintiff, while in the exercise of due care, fell into said ditch, and was damaged thereby, then you will find for the plaintiff." No complaint is made of this instruction, and the verdict of the jury must be taken as a finding that the city did not exercise due care to make the highway safe.

In *Gould v. Schermer,* 101 Ia. 582, a case wherein plaintiff's horse became frightened on a bridge which had no guard rails, it was held that the question of negligence was for the jury, although guards or rails were not required by law.

A case very closely in point is cited with approval in *Dailey v. Swift & Co.,* 86 Vt. 189, wherein the court say:

"What is known as the 'Partridge Case,' *Hilas Grow v. Town of Corinth,* heard and decided by this court, in Orange county, in March, 1881, though never reported, seems to have involved much the same principle, in this respect, as the case now before us. There, when the plaintiff, a traveler, was passing over a public highway in the defendant town, driving a pair of horses, his horses took fright at the noise made by the flying up of a partridge in the bushes on the upper side of the traveled road, but within the limits of the highway, became unmanageable, and without fault on his part ran off the bank on the lower side of the road, whereby the plaintiff was injured. There was no guard or railing on that side of the road where the team went off. On the facts found by a referee, the town contended that the proximate cause of the in-

jury was the flying up of the partridge, and not the want of a guard or railing on the side of the road, and therefore it was not liable.

"It was held, Chief Judge Pierpont orally delivering the opinion of the court, that a suitable guard or railing on the side of the road at the place in question would have prevented the accident, and consequently the want of such guard or railing was the proximate cause of the injury, and the town was responsible." For other cases in point, see *Walrod v. Webster County,* 110 Ia. 349; *Harvey v. City of Clarinda,* 111 Ia. 528.

It is further said that the verdict is excessive. There is a conflict in the evidence as to the extent and character of the injuries received. Plaintiff claims that his back was wrenched, that one ankle was so badly crushed that it was necessary to keep it in a cast for several weeks, and he was still wearing a brace at the time of the trial, about five months after the accident. He also claims to have suffered a hernia. There is evidence that his ankle has practically recovered, and there is a dispute as to whether hernia was produced as a result of his injury. But plaintiff was before the trial court and the jury. They were better able to judge of his injuries and his sufferings than we. The verdict does not seem to be so excessive as to require a remittitur.

As a final assignment, it is said that the court erred in overruling the motion for a new trial because of newly discovered evidence. Affidavits in support of the motion are found in the transcript, while we have uniformly held that in order to have such affidavits considered on appeal they must be incorporated in the bill of exceptions.

The judgment is

AFFIRMED.

ROSE, J., dissents.

LETTON, J., not sitting.

DANIEL J. POLLOCK, APPELLANT, V. PHILIP PEARSON ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19454.

Trial: DIRECTION OF VERDICT. It is the duty of the trial court to instruct the jury to find for defendant when the evidence is not sufficient to sustain a verdict for the plaintiff.

APPEAL from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

L. L. Raymond, for appellant.

Wright & Mothersead, contra.

MORRISSEY, C. J.

Plaintiff agreed with defendant, a piano salesman, for the purchase of a piano of a specified make for $340, and executed his promissory note for that amount, the note being payable to defendant. Defendant agreed to have the piano shipped from the factory to plaintiff's home at Scott's Bluff, where plaintiff should have the right to inspect the instrument, and, if it was found to be satisfactory, the note, which by agreement between the parties had been deposited in the hands of a third party, was to be delivered to defendant. Defendant ordered the piano shipped to plaintiff, but had the bill of lading sent to himself. Before the piano reached Scott's Bluff, defendant concluded that the note might be uncollectible, and notified the railroad company that the piano should not be delivered to plaintiff. Plaintiff then brought this action in replevin against defendant Pearson, the railroad company, and its agent, alleging ownership and right to immediate possession. On the trial it was stipulated that neither the railroad company nor its agent had any interest in the litigation, and the trial proceeded against defendant Pearson. At the conclusion of the testimony the court instructed a verdict for the defendant, and plaintiff appeals.

There is little, if any, dispute in the evidence so far as the material issues are concerned. If the verdict returned is the only one which the evidence would sustain, there can be no error in the direction of the court. And in this respect it is necessary to consider only the testimony of plaintiff. His statement of the agreement is substantially as heretofore detailed. He says it was agreed that the note should be held by a third party, one Telander, until such time as plaintiff inspected the piano and notified Telander to turn the note over to defendant. This shows that the parties had merely entered into an executory contract, which defendant might rescind before delivery, and thus prevent the title passing. Whatever plaintiff's right might be to recover for breach of the contract, the title to the property had not passed.

The verdict returned is the only one that could be sustained by the evidence, and the court did not err in directing a verdict.

AFFIRMED.

J. S. FARRENS ET AL., APPELLEES, V. FARMERS STATE BANK OF DECATUR ET AL., APPELLANTS.

FILED MAY 19, 1917. No. 19985.

1. **Banks and Banking: "DEPOSITOR."** A "depositor" is one who delivers to or leaves with a bank money subject to his order, either upon time deposit or subject to check.
2. ———: DEPOSIT BY DIRECTOR. As the statute governing banks and banking stood prior to the enactment of House Roll No. 201, by the thirty-fifth session of the Nebraska legislature, a director of a state bank, as regards a deposit made by him in the bank of which he was a director, stood in the same position as any other depositor.

APPEAL from the district court for Burt county: GEORGE A. DAY, JUDGE. *Affirmed.*

Willis E. Reed, Attorney General, and *Dexter T. Barrett,* for appellants.

Stout, Rose & Wells and *James A. Clark, contra.*

MORRISSEY, C. J.

In May, 1916, at the suit of the state banking board, the affairs of the Farmers State Bank of Decatur were placed in the hands of a receiver. Subsequently this plaintiff and three others each filed in due form his claim with the receiver for the sum of $7,500, and asked that the same be treated as a deposit and allowed as a preferred claim, and, when so allowed, that it be paid out of the assets of the bank or the depositors' guaranty fund. Each claim is evidenced by a certificate of deposit in the usual form, dated April 1, 1916, issued by the Farmers State Bank of Decatur. Each certificate was made payable three months after its date, drew interest at 5 per cent., and stated upon its face that it was protected by the depositors' guaranty fund of the state of Nebraska. To these claims the attorney general filed objections, alleging that claimants were directors of the Farmers State Bank at the time the certificates were issued; that the money was deposited with the Security State Bank of South Omaha to pay an indebtedness of the Farmers State Bank of Decatur, which was not secured by the depositors' guaranty fund, and that the total assets of the Farmers State Bank of Decatur, including the liability of the stockholders, were insufficient to pay the amount owed by the bank to its depositors.

After a full hearing, the district court overruled the objections and allowed the claims. The principal point now urged in the brief of the attorney general is: These certificates do not represent money placed with the bank as a deposit, but represent merely a loan to the bank. It is admitted that the bank got the benefit of the money. If it was placed in the bank as a deposit it is protected by the depositors' guaranty fund, while if it was merely a loan to the bank it is not so protected. We are asked by the appellees to affirm the judgment because the assignment of error differs from the issue tendered in the lower court,

but as this case was tried to the court without a jury, and is a matter of public importance, and all parties understood throughout the trial the main purpose of the protest and objection, and all of the facts necessary for a determination of the case on the issue tendered in the protest or in the assignment of error in the record, we prefer to dispose of the question on its merits rather than on the procedure.

The evidence shows that prior to the issuance of these certificates each claimant was a director of the Farmers State Bank of Decatur; that the bank was in need of money; that it borrowed from the Security State Bank of South Omaha $16,000, and pledged as collateral security notes of the face value of $22,000, and of the admitted value of $20,000. Claimants, who were not experienced bankers or business men, each borrowed from the Security State Bank $7,500, then deposited this amount with the Farmers State Bank of Decatur, and took as evidence thereof the certificates heretofore mentioned. The Decatur bank then paid off its indebtedness to the Security State Bank and redeemed the paper that had been put up as collateral security. The Decatur bank got the full value for each certificate. Had the money been deposited by some party not an officer or director of the bank, there would be no question as to his right to be listed as a depositor. The attorney general argues that these parties were merely making a loan to the bank, and that the relation of creditor and debtor exists. In a certain sense this is true. In *State v. Corning State Savings Bank,* 136 Ia. 79, a depositor was defined to be: "One who delivers to or leaves with a bank money subject to his order. These may be either time deposits or open ones subject to check." These certificates are in the usual form. The transaction was such on its face as occurs every day in the banking business. If claimants are to be denied the rights of a depositor, it must be solely because they were directors of the bank.

As the statute stood at the time of the transaction, an officer was not forbidden to become a depositor or denied

any privilege accorded to others doing business with the bank. The legislature not having denied this privilege, the court cannot. The legislature which has just adjourned has enacted a statute to meet such situations. House Roll No. 201, approved April 19, 1917. The fact that it took such action may be regarded as a legislative construction of the statute, and we may assume that when our bank act was originally passed it was not intended to exclude directors from the benefits of the act. If so, claimants fall within its protection. Again, it may be pointed out that the equities of the case are with the claimants. The bank got the benefit of their money; with their money it redeemed its collateral security, which was worth considerably more than the amount for which it was pledged. Not only the bank but the depositors' guaranty fund received the benefit of their money, and claimants are still liable for the penalty as stockholders. Indeed, the judgment of the district court directed the receiver to withhold the amount for which they are liable as stockholders. Thus all parties are amply protected and justice is done.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

FRANK H. CUNNINGHAM, APPELLANT, V. THOMAS LAMB ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19225.

1. **Vendor and Purchaser:** BREACH OF CONTRACT: DAMAGES. In an action for damages for breach of a contract to convey land, the recovery of the amount paid upon the contract is a proper element of damages.
2. **Judgment:** BAR: BREACH OF CONTRACT: DAMAGES. Where, in an action for specific performance of a contract to sell lands, the plaintiff has pleaded that the defendant had conveyed the land for a valuable consideration before the beginning of the action to

a person not a party to the suit, and, under a prayer for general equitable relief, the district court has allowed the plaintiff credit for the money paid upon the contract, to be applied on a sum found due defendant on other contracts involved in the action, and plaintiff has availed himself of such credit, he cannot afterwards maintain an action to recover further damages for the loss of his bargain.

APPEAL from the district court for Banner county: RALPH W. HOBART, JUDGE. *Affirmed.*

Burkett, Wilson & Brown, for appellant.

J. L. McIntosh, contra.

LETTON, J.

Action to recover damages for breach of a contract to sell real estate.

The petition alleges that the defendant, Thomas Lamb, in October, 1909, was the equitable owner of a section of land in Kimball county, under a contract of purchase with the Union Pacific Railroad Company; that he entered into a contract with the plaintiff to sell him the land and assign the railroad contract; that the land at that time was of the reasonable market value of $8,000; that the amount he was to pay defendant and Union Pacific Railroad Company for the land made the total purchase price $3,038; that plaintiff duly performed the terms of the contract, but defendant, in disregard of the same, sold the land and assigned the contract to one Weeces in April, 1911, to plaintiff's damages in the sum of $4,962, for which sum he asks judgment.

The answer consists of a general denial, a plea of forfeiture of the contract, and a plea that a former action had been brought by plaintiff in Kimball county against John D. Lamb and Thomas Lamb, the defendant, for the specific performance of contracts to sell section 3, the section in controversy, with two other sections of land; that the court awarded specific performance as to the other two sections, and found as to the section involved here that, inasmuch as an innocent person had acquired the owner-

ship of section 3 and had paid the defendants for the same, it would not be equitable to require specific performance as to that section, but that plaintiff should be entitled to credit for the amount of money he had paid defendant and had paid the Union Pacific Railroad Company on the contract, with interest, amounting in all to the sum of $602.52; that this judgment is in full force and effect; and that, owing to plaintiff having accepted the credit of $602.52, he is estopped from now claiming a greater amount as damages for the breach of contract. The cause was tried by the court without the intervention of a jury. The district court found that the judgment in the Kimball county case was *res judicata* of the rights of the parties; that plaintiff is estopped from now claiming further damages, and dismissed the action. Plaintiff appeals.

The only question presented by this appeal is whether the judgment in the former action is a bar to this suit. The plaintiff knew at the time of beginning the action for specific performance that the defendant had already assigned, transferred, and delivered the land contract and his interest in the land—presumably in good faith, since fraud or bad faith is not alleged—to Weeces, who had paid value for it. He so alleged in his petition. He thus asked for something at the hands of the court which he was not entitled to receive and which the court had no power to grant, since Weeces was not a party to the suit. The only object in making these allegations must have been to obtain damages, since no other relief could be granted as to this cause of action. He no doubt thought that the general prayer in his petition was broad enough to allow such a recovery. Whether, in such an action, under such allegations and such a prayer, the district court sitting as a court of equity should try the question of damages, it is unnecessary to decide. The question is not free from doubt. If a plaintiff knows when he begins his suit that he has no case for equitable relief, can he deprive his adversary of a jury trial by praying for such relief? An interesting discussion on this point may be

found in 36 Cyc. 747, 750. Since the same court now administers both law and equity, a jury might be called to ascertain damages.

The district court evidently considered that under the prayer for general equitable relief it had the power to award damages for the breach of contract. Unless it so considered, it could not have awarded any relief as to section three.

Courts differ as to the measure of damages in case of a failure to perform a contract for the sale of real estate. Some courts hold that the measure is the consideration money paid with interest; others, the value of the land at the time of the breach, or, what is the same thing, the return of the consideration money paid and the difference between its amount and the value of the land when the conveyance should have been made. 39 Cyc. 2106-2114; *Combs v. Scott,* 76 Wis. 662, and cases cited in the opinion; *Beck v. Staats,* 80 Neb. 482. The latter is the rule in this state. In an action for damages for breach of a contract to convey land, the plaintiff is entitled to recover all money paid by him on the contract as well as for his loss of his bargain. *Anderson v. Ohnoutka,* 84 Neb. 517; *Beetem v. Follmer,* 87 Neb. 514.

In granting relief under this prayer, the plaintiff probably did not receive all the damages to which he was entitled. He received nothing for the loss of his bargain. Even if the court had been mistaken in considering that the general prayer for equitable relief, in a case where the pleading showed no equitable relief could be had, warranted the ascertainment and award of damages in such an action, the plaintiff made no complaint, accepted the benefits of this holding, and took advantage of the damages allowed as a credit on the amount he was required to pay as a condition to the conveyance of the other contracts. He cannot split his cause of action by receiving a part of his damages in one case and then beginning a new action to recover those not then awarded him. He was concluded by the judgment as to the amount of such dam-

ages and cannot relitigate the question. The principles announced in the leading case of *Cromwell v. Sac County*, 94 U. S. 351, and the other cases cited by appellant, are sound and have been followed by this court, but the facts in this case are such that these principles are not applicable.

The judgment of the district court is therefore

AFFIRMED.

EDGAR P. WRIGHT, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MAY 19, 1917. No. 19327.

1. **Master and Servant:** INJURY TO SERVANT: NEGLIGENCE: QUESTION FOR JURY. In this an action for damages for personal injuries sustained by a street railway conductor by coming in contact with a charged wire, the evidence is examined, and *held* to require the submission to the jury of the question whether the defendant was negligent in maintaining such wire at the height of 5½ feet above the top of the railway car at the point where the accident occured.
2. **Appeal:** DEMONSTRATIVE EVIDENCE. Where there was a sharp conflict in the testimony as to the existence of any permanent injury to or deformity of the plaintiff's spine, defendant was not prejudiced by the court permitting the plaintiff to bare his body so that the doctors testifying in his behalf could better describe the nature of the injuries claimed to have been sustained.
3. **Excessive Damages.** Under the facts proved, a verdict for $30,000 is excessive.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed on condition.*

John L. Webster and *William Ross King*, for appellant.

Sutton, McKenzie, Cox & Harris, contra.

LETTON, J.

This is an action to recover damages for personal injuries. The plaintiff was a conductor in the employment

of defendant, and was in charge of an electric street car at the time of the accident. At one end of the run the car was turned by means of what is known as a "Y." In this operation the car is backed over a switch track forming one side of the "Y." In June, 1914, about midnight, on a dark and rainy night, the trolley pole left the wire while the car was being switched. It was the duty of plaintiff to replace the trolley upon the wire by means of a rope attached thereto, which was also fastened to the car. The rope broke close to the upper end of the trolley pole as the pole sprang up. There was no street light near. As soon as the trolley left the wire the lights in the car went out. Plaintiff testifies that, as was his duty, he went upon the top of the car to release the trolley pole and place it upon the wire; that he had never been upon the top of the car for this purpose at this point; that he had been instructed before he began to work and shown how to do this by an old conductor assigned for the purpose by the defendant; that he was told that the wires were not within striking distance of his head, and that, even if one did strike his head, there was no danger as long as he was standing on the top of the car; that he was told that, when the rope broke and he had to go on the top of the car, it was his duty to push the trolley pole against the wire so as to move the car forward far enough to pull the trolley pole from between the cross-wires; that he followed these instructions; that the motorman moved the car up a little; that he was about to stop him when his head struck, he received the shock, and knew nothing more until he was picked up from the ground. Other testimony is to the effect that the wires at the place where the plaintiff was injured were 5 feet 6 inches from the top of the car. The plaintiff was 5 feet 9 inches tall.

The negligence charged is that defendant was negligent in constructing and maintaining the wires in an unlawful, careless and dangerous manner about 5 feet above the top of the car; that defendant, while knowing the state of the wires, was negligent in not advising the plaintiff of the

dangerous construction, and in failing to warn him of the dangers incident to putting the trolley pole on the wire at this place, and was negligent in not providing insulation for the trolley pole, and in failing to provide sufficient tools or equipment for placing the pole upon the wire without exposing plaintiff to danger.

The answer denies negligence, alleges that the plaintiff was familiar with the manner of construction of the tracks, cars, trolley poles, and trolley wires, and knew the dangers incident to the operation of his work; that plaintiff had been a conductor for 3½ years prior to the accident, and was familiar with the construction and elevation of the trolley wires at that place for all of said time, and that, knowing the danger, he negligently took hold of the trolley pole; that the accident was brought about by his own carelessness and neglect of duty, and that the pole and wires were maintained and constructed in the usual and proper manner. The jury returned a verdict in favor of plaintiff for the sum of $30,000. Defendant appeals.

The court instructed the jury that the only acts of negligence charged against the defendant for them to consider were "that the defendant company was guilty of negligence in the method or manner of constructing or maintaining its overhead wires at the place of the accident in question," and "that the defendant company was guilty of negligence in failing to notify the plaintiff of the dangers incident to working on top of the car in close proximity to the wires," and that if they failed to find by a preponderance of the evidence that the defendant was guilty of negligence in either of these particulars their verdict should be for defendant.

A number of assignments of error are made with respect to the introduction of evidence, but we find no error so prejudicial to defendant as to require a reversal. The evidence is in conflict as to the proper height at which such wires should be maintained, as to the height above the top of a car at which wires were maintained at other

localities in the city, as to whether Wright had been fully instructed with respect to the dangers which might be incurred by coming in contact with charged wires, and upon almost every other material fact involved.

It is also assigned that the court erred in permitting the exhibition of plaintiff's body in the presence of the jury. The doctors called as witnesses by plaintiff testified that the injury had induced the disease of spondylitis deformans, and had caused a permanent deformed condition of the spine, pointing out on plaintiff's body the consequences of the injury as in their opinion they existed. For the defendant several witnesses, doctors and surgeons of long experience and high standing in the profession, testified that no degeneration of the vertebræ had taken place, and that the stooped and bent-over condition of plaintiff was caused by a neurasthenic condition; that the disease mentioned did not exist; that the X-ray pictures did not disclose a wasting away of the spinal processes; and that the bent condition of plaintiff was not permanent if he made an effort to overcome it and straighten up. There was no error in the exhibition of plaintiff's body to the jury under such circumstances. *Felsch v. Babb,* 72 Neb. 736; *Booth v. Andrus,* 91 Neb. 810. There were no scars of other wounds to confuse the jury as in the case of *McKennan v. Omaha & C. B. Street R. Co.,* 97 Neb. 281.

Aside from the claim that the damages are excessive, the principal contentions of the defendant are the lack of evidence of negligence in the construction and maintenance of the wire at that height, and that Wright had been in the service long enough to see and had ample opportunity to know the danger of short circuits, and that he did not come against the wire by reason of ignorance, but through inadvertence.

Considering the evidence as a whole, we are satisfied that it was sufficient to submit these questions to the jury. Wright had worked on this run for over 3 years. He must have been aware in a general way of the height of the wires, but to a man looking from the ground a difference

of about 3 inches in the height of a wire 17 or 18 feet from the ground would be almost imperceptible. There is no proof that he was ever upon the top of the car at a point nearer than 30 feet from where the accident occurred, or at any point where the wires were as low as here. A difference of 3½ inches in the height of the wire would have placed it beyond the reach of his head. The accident occurred at midnight on a dark and rainy night. The lights in the car were out by reason of the connection being broken. Ordinary care and prudence would seem to dictate that, where a conductor may be required under such circumstances as these to go upon the top of the car in the dark, the wire should be high enough so that no part of his body might come in contact with it, or other precautions be taken to prevent such an accident. There is no definite proof on behalf of defendant that such a dangerous construction was maintained at the height at which approved methods of street railway construction in the country generally are maintained, and the evidence is not so clear as to justify the removal of the question from the jury. We find no error in the instructions which are complained of covering these points.

The principal complaint is that the verdict is so excessive that it must have been the result of passion or prejudice. In his original petition plaintiff prayed for $25,000 damages. At the trial he was permitted to amend his petition to ask for $35,000. He was earning $93 a month at the time of the accident, or $1,116 per annum. His expectancy was shown to be 28.96 years. The verdict was for $30,000. If the opinions of the medical witnesses for the plaintiff are well founded, as the jury believed, plaintiff is entitled to substantial damages for the pain and anguish he has suffered, for the permanent disability, and for the humiliation occasioned by his deformity, in addition to the amount which he would be entitled to recover for the loss of his earning capacity. The medical testimony is in such sharp conflict as to the existence of the deforming disease that it is to be regretted that the law does

not permit a re-examination as in cases under the workmen's compensation act. We must accept the finding of the jury on this point. There is ample evidence to support it, if the contrary opinions are rejected, as the jury had a right to do. Considering the present worth of his earnings for the period of his expectancy and the other elements of damage, it would seem that a recovery of $30,000 is excessive, and that the evidence does not justify a recovery of more than $20,000. The judgment of the district court is affirmed upon plaintiff entering a remititur of $10,000; otherwise it is set aside and a new trial allowed.

JUDGMENT ACCORDINGLY.

ANTON DWORAK, APPELLANT, V. SUPREME LODGE, WESTERN BOHEMIAN FRATERNAL ASSOCIATION; MARIE DWORAK ET AL., APPELLANTS; WILLIAM DWORAK ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19502.

1. Insurance: FOREIGN BENEFICIAL ASSOCIATIONS: LIMITATIONS. A benefit society incorporated in another state which comes into this state in order to do business under the permission granted by the laws of Nebraska is subject to the same limitations and restrictions as such an association organized in Nebraska.
2. ———: ———: BENEFICIARIES: LAW GOVERNING. The statute of Nebraska which specifically prescribes the persons to whom payment of benefits by a fraternal beneficiary association can be made (Rev. St. 1913, sec. 3298), governs in all Nebraska contracts. The law of the domicile of a foreign association has no application to such contract.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Weaver & Giller, Louis Berka and *Nelson C. Pratt,* for appellants.

Stout, Rose & Wells, contra.

LETTON, J.

Joseph Dworak, a resident of Nebraska, became a member of the defendant, which is a fraternal beneficiary association, organized in the state of Iowa. The certificate provided that upon his death the sum of $1,000 would be paid to his wife, Marie Dworak, and his stepchildren, Milton Dworak and Stanley Dworak. He died and left surviving him William Dworak, Joseph Dworak, Carrie Dworak, now Carrie Johndeit, and Arthur Dworak, his children by a former marriage. He had no children by the second marriage. He became divorced from his wife and ceased to reside with her and her children, so that thereafter none of the beneficiaries were members of his family or household. Shortly before his death he designated the plaintiff, Anton Dworak, his brother, as beneficiary, instead of his former wife and her children, but the former beneficiaries allege that this was not done in accordance with the by-laws of the association and is therefore of no effect. This action was brought by Anton Dworak to recover the proceeds of the certificate. The defendant association admitted the indebtedness, alleged that there were several claimants of the fund, and paid the money into court for the benefit of the persons whom the court might find entitled to it. The divorced wife, Marie Dworak, and her children claimed as beneficiaries under the certificate. The children of the insured in their answer plead the invalidity of the assignment to plaintiff, set forth the facts as to the divorce of Marie Dworak, alleged that neither she nor the other beneficiaries were members of the family of Joseph Dworak at the time of his death, or for a long time prior thereto, and were not blood relatives or dependent upon him, that they are the children and the only heirs of the insured, and that under the constitution and by-laws of the association and the laws of the state of Nebraska they were entitled to the amount due upon the certificate.

At the oral argument it was stated by counsel for Anton Dworak that his client was willing that the fund be paid

to the children and next of kin as was adjudged by the district court. This relieves the court of the necessity of considering the validity of the attempted change of beneficiaries. The only question necessary to determine is whether the statutes of Iowa and by-laws of the association govern the disposition of the fund, or whether this is controlled by the laws of the state of Nebraska. If the former apply, the beneficiaries named, the divorced wife and her children, are entitled to the money; if the latter, the children of Dworak are entitled to it.

The case was tried upon an agreed statement of facts. In addition to the facts hereinbefore stated, it appears that the application for membership was made in Omaha and forwarded by the officers of the local lodge to Cedar Rapids, Iowa, where the certificate was made out and signed by the supreme officers. It was then forwarded to the subordinate lodge in Omaha, was signed by the officers of the local lodge in Omaha, and delivered there to the insured. The application provided that the certificate would not be effective until the applicant was initiated in the local lodge and the certificate delivered to and signed by the applicant. After April, 1910, neither Marie Dworak nor her children lived with the insured, and none of them was a blood relative of or dependent upon the insured, nor an heir. The divorce was granted Marie Dworak in February, 1911. The Iowa statutes provide: "No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such member." Iowa Code, sec. 1824. The supreme court of Iowa in *White v. Brotherhood of American Yeomen,* 99 N. W. 1071 (124 Ia. 293), construing section 1824 of the Iowa Code, where the facts were that a certificate was issued by a fraternal association "payable to a certain person by name, such person being the wife of the member when the certificate was is-

sued; subsequently she was divorced, and the member remarried, but made no change of beneficiary"—held that on the death of the member the first wife was entitled to the proceeds of the certificate. The business is conducted in the Bohemian language. The articles of incorporation recite as one of the objects of the organization: "To provide for the creation of a fund of assessments, contributions or otherwise, for the purpose of paying benefits to widows and children of deceased members, in accordance with the constitution, by-laws, rules and regulations that are now in force or that may from time to time be adopted by this supreme lodge." The by-laws provide that the benefit certificates "among other contents must contain also the name of the person or persons designated as heirs by the insured member, who have to be members of the family or related to him by birth." Another translation is: "This insurance, however, can be only in favor of the members of his family, or blood relatives, or mutually for husband or wife, or persons dependent on the member."

Section 94, ch. 43, Comp. St. 1911 (Rev. St. 1913, sec. 3298), which was in effect at the time the certificate of insurance was issued and at the time of the death of Dworak, provides: "Payment of death benefits shall only be made to families, heirs, blood relations, affianced husband, or affianced wife, or to persons dependent upon the member." It will be noted that in Iowa whether a person may become a beneficiary is determined by his status at the time the contract is entered into, but in this state the law controls to whom payment shall be made upon the matured obligation. We have held under a like state of facts with reference to the application for insurance, the conditions for membership, and the delivery of the certificate, that such a contract was entered into in Nebraska. *Pringle v. Modern Woodmen of America,* 87 Neb. 548; *Haas v. Mutual Life Ins. Co.,* 90 Neb. 808. A like view is taken in Illinois and Maryland: *Coverdale v. Royal Arcanum,* 193 Ill. 91; *Expressman's Mutual Benefit Ass'n v. Hurlock,* 91 Md. 585.

When the defendant association entered this state to do business, it came subject to the laws of this state regulating fraternal insurance. The statutory provision limiting and defining the classes of the persons to whom death benefits should be paid became as much a part of the contract of insurance as if it had been written therein, and it declared the policy of the state with respect to such contracts. *Leumann v. Grand Lodge, A. O. U. W.*, 85 Neb. 803. Every person concerned with the same, whether insurer, insured, or beneficiary, is bound to take notice of the law. It is pointed out in 29 Cyc. 108, that "where the classes of persons to whom benefits may be paid are prescribed by statute or by the society's charter of incorporation, neither the society, nor a member, nor the two combined, can divert the fund from the classes prescribed." It is also a settled rule that where a beneficiary becomes ineligible or disqualified, and therefore not entitled at the time of the death of the insured to receive the benefit, the fund goes to such other persons within the class as are eligible to take the benefits in the manner prescribed by statute. *Giffin v. Grand Lodge, A. O. U. W.*, 99 Neb. 589; *Johnson v. Grand Lodge, A. O. U. W.*, 91 Kan. 314, 50 L. R. A. n. s. 461; *Knights of Columbus v. Rowe*, 70 Conn. 545; *Lister v. Lister*, 73 Mo. App. 99; *Supreme Lodge, K. & L. of H., v. Menkhausen*, 209 Ill. 277.

Appellants rely upon *Supreme Council, Royal Arcanum, v. Green*, 237 U. S. 531, L. R. A. 1916A, 771. The question in this case is so different that the opinion in that case does not control its decision. The question there involved the relation existing between the corporation and its members and between the members themselves with respect to uniformity of assessments in different states. Here we are not concerned with such questions, since such relations have all been terminated by the maturity of the contract. The corporation itself is practically out of this case. It has paid the money in dispute into court for the benefit of the proper beneficiary. The contract was made with respect to

the Nebraska statute, and it must control the payment of the obligation.

JUDGMENT AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

HAMER, J., dissenting.

The case relied upon in the majority opininon is *Giffin v. Grand Lodge, A. O. U. W.*, 99 Neb. 589. That case was based upon a contract entered into in Nebraska by a resident of Nebraska. Thomas Coppinger was a member of the grand lodge of Ancient Order of United Workman, a fraternal insurance society, organized under the laws of Nebraska. The society, through its subordinate lodge at Gibbon, Nebraska, issued to Coppinger a certificate for $1,000 in which his wife was named as beneficiary. She obtained a divorce from Coppinger, and he died. No change was made in the benefit certificate by Coppinger after the plaintiff got her divorce. The plaintiff brought her action against the defendant society, and the sisters and brothers of Thomas Coppinger interpleaded. The district court decided in favor of the interpleading defendants, and gave them judgment for the amount of the benefit certificate, $1,000, less the sum of $130.40, which it was shown that the plaintiff had paid as dues upon the certificate, the plaintiff being allowed an equitable lien upon the benefit certificate in force. The plaintiff appealed, and the controversy was between the former wife of Coppinger and the heirs of the insured, who were his sisters and a brother. The plaintiff obtained her divorce August 25, 1912, and Coppinger died March 4, 1913. Perhaps the fact that the plaintiff took Coppinger to her home after he fell sick and took care of him until he died may have made a kindly feeling toward her upon the part of the members of the local society. He was sick and out of money. By the opinion it appears that section 96 of the by-laws of the society provided: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more mem-

bers of his family, or some one related to him by blood, or his affianced wife." The certificate issued designated Coppinger's wife as his beneficiary. Section 98 of the by-laws provided: "If one or more of the beneficiaries shall die during the lifetime of the member, the surviving beneficiaries or beneficiary shall be entitled to the benefit equally, unless otherwise provided in the beneficiary certificate, and if all the beneficiaries shall die during the lifetime of the member, and he shall make no other direction, the benefit shall be paid to his widow if living at the time of his death," or if there shall be no widow, no children, no grandchildren, no mother, no father, "then the brothers and sisters of such member, share and share alike," and the money shall go to the beneficiary fund of the grand lodge if no one living at the time of the death of the member is entitled to said benefit. It was alleged that the deceased left no widow nor children nor father nor mother, and that defendants were his sole heirs at law.

After Coppinger's wife obtained a divorce from him, he did nothing to change the beneficiary, but, so far as he was concerned, left the divorced wife to continue as his beneficiary, and he probably preferred that she should be, as she was always supposed to be kind to him and she took care of him in his fatal illness, and she paid the premiums on the policy alone. The district court found against her, and however equitable and just her claim may have been, and however willing the association may have been to pay her, the district court cut her off because of what he supposed to be his duty. The question for decision therefore was whether the plaintiff named in the beneficiary certificate was entitled to the proceeds of the certificate or the sisters and brother of the insured. He intended all for her.

The statute which it was claimed affected the question was sec. 94, ch. 43, Comp. St. 1911, which was in force at the time of the death of said Coppinger, and which has been embodied in similar form in sec. 3298, Rev. St. 1913. The section reads: "No fraternal society created or organized under the provisions of this act shall issue beneficiary cer-

tificate of membership to any person under the age of 18 years, nor over the age of 55 years. Payment of the death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of or to persons dependent upon the member." The statute quoted and the by-laws set out are limitations upon the power of the lodge to contract. If available to any one, these limitations are available to the lodge, and should not operate to confer a right upon any one not named in the certificate to participate in the fund due the beneficiary. By section 98 of the by-laws the amount due on the certificate is to be paid to the beneficiaries therein named unless said beneficiaries shall die, in which event, only, the benefit shall be paid to the widow, children, grandchildren, parents, brothers or sisters. Section 94, ch. 43, Comp. St. 1911, is, also, a limitation upon the power of such societies to contract, and is not sufficient to confer any title to the fund upon any one not named in the certificate. The fourth section of an act passed in 1897 (Laws 1897, ch. 47) entitled "An act defining fraternal beneficiary societies, orders or associations, and regulating the same, and to repeal an act entitled 'An act to exempt certain societies and associations from the requirements of chapter 16 of the Compiled Statutes,'" has no other purpose than to define the powers of such societies. The statute does not prescribe, nor do the by-laws define, to whom payment of the death benefit shall be made in the event that the beneficiary named in the certificate is an improper person, because of the by-laws or the statute. The certificate does not name any person entitled to become a beneficiary. The certificate remained unchanged, and with the name of the wife who procured the divorce in it. The brothers and sisters in that case should have had no standing. The people who came in and claimed the money as beneficiaries were strangers to the contract. The wife was a proper person at the time the certificate was issued to be named as beneficiary, and her rights ought not to have been affected by reason of the subsequent divorce. No one but the insurer could properly make the contention that she had no

insurable interest in the life of the deceased at the time of his death. Who had a right to put the name of the beneficiary out of the certificate? The decree of divorce did not do it. *Schmidt v. Hauer,* 139 Ia. 531. It ought to be the rule that life insurance valid in its inception remains so unless otherwise stipulated in the contract. *Courtois v. Grand Lodge, A. O. U. W.,* 135 Cal. 552; *Overhiser, Adm'x, v. Overhiser,* 63 Ohio St. 77; *Connecticut Mutual Life Ins. Co. v. Schaefer,* 94 U. S. 457; Bacon, Benefit Societies (3d ed.) sec. 253. The language used in section 96 of the by-laws cannot be said to be equal to an agreement that, in the event of a change in the status of the beneficiary named, the designation of such person shall be no longer of any force or validity. The interpleading defendants had no standing in the case, for the reason that only the society could properly object. The contract made was a contract between the insured and the society. The society was perfectly willing to pay the former wife. The decision rendered was a very severe sort of decision in view of the actual facts, and it was an unjustifiable decision apparently in view of the law. The arrangement made was an arrangement between the insurance company and the insured. When he wanted somebody else to be the beneficiary, rather than the old wife who provided for him up to the time of his death, it was time enough to change the beneficiary.

The principle invoked was decided by this court in *Baker v. Hardy,* 96 Neb. 377. Columbus Hardy, the deceased, had been a member of the National Union, a fraternal society, and had taken out a benefit certificate in favor of his wife, Mina I. Hardy. Shortly before his death, and without the knowledge or consent of his wife, he caused the certificate to be made payable to his son as trustee for his wife and his mother. The trustee was directed to pay to the mother an indebtedness which was owing to her and to pay the remainder to the wife. The certificate was paid to the son, and he disregarded the direction to pay to the mother, and the suit was prosecuted by the guardian of the mother.

Judgment was rendered against the guardian, and he appealed. This court said: "It is defendant's first contention that the plaintiff could not be named as a beneficiary, because she was not a member of the family of the deceased within the meaning of the laws of the order at the time of the change of the beneficiary, and was not a dependent. It appears that the laws of the society nominated blood relations, members of the family, and dependents as proper persons to be named as beneficiaries. * * * The testimony shows that during the life of the assured he changed the beneficiary by making his son, Noble Vaughn Hardy, a trustee to collect the money to become due under the beneficiary certificate for the benefit of his mother and his wife. This change was consented to by the National Union, and after the death of the assured the amount due on the benefit certificate was paid to the defendant, as trustee, by the society, without any objection whatsoever. The insurer having paid the amount of the certificate to the trustee, no other party can complain of the change, for that is a right which can only be taken advantage of by the insurer. 29 Cyc. 105-107; *Tepper v. Supreme Council, Royal Arcanum,* 59 N. J. Eq. 321; *Young Men's Mutual Life Ass'n v. Harrison,* 10 Ohio Dec. 786; *Alfsen v. Crouch,* 115 Tenn. 352, 89 S. W. 329; *Grand Lodge, A. O. U. W., v. Brown,* 160 Mich. 437; *Johnson v. Van Epps,* 110 Ill. 551."

In *Johnson v. Knights of Honor,* 53 Ark. 255, 8 L. R. A. 732, the statute was similar to ours. Comp. St. 1911, ch. 43, sec. 94. In that case it was said in the opinion that the word "heirs" is a technical word. "At law it was used to designate the persons on whom an inheritance in real estate was cast by the law on the death of the ancestor. Originally it could not be used to designate those on whom the goods or chattel property were cast, because the law cast them upon no one. No one 'was appointed by law to succeed to the deceased ancestor; on his death, they became *bona vacantia,* and were seized by the king on that account, and by him, as grand almoner, applied to pious uses, * * * for the good of the souls of their former owner.'" It is

then said the "weight of authority holds that the word 'heirs,' when used in any instrument to designate the persons to whom personal property is thereby transferred," means those who under the statute of distribution are mentioned as heirs in the event of death and intestacy, citing many cases in England and America, among others, *Houghton v. Kendall,* 7 Allen (Mass.) 72; *Croom v. Herring,* 4 Hawks (N. Car.) 393; *Eddings v. Long,* 10 Ala. 203; *Richards v. Miller,* 62 Ill. 417; *Hascall v. Cox,* 49 Mich. 435.

In the Arkansas case the court held that no one but the lodge could raise the question of ineligibility of the beneficiary, and that by paying the money into court it had waived the defect. *Johnson v. Van Epps,* 110 Ill. 551; *Peek's Ex'r v. Peek's Ex'r,* 101 Ky. 423; *Alfsen v. Crouch,* 115 Tenn. 352; *Stoelker v. Thornton,* 88 Ala. 241.

In *Cowin v. Hurst,* 124 Mich. 545, M. was a member of the Ancient Order of United Workmen. The beneficiary was entitled to receive $2,000. His first beneficiaries, his wife and daughter, having died, he wished to make his son-in-law his beneficiary. As this was prohibited by the articles of the association, he made his niece his beneficiary, with a written agreement receipt of the fund that she should pay it over to his son-in-law. The niece received the draft, but refused to transfer to the son-in-law or to pay him the money. It was held that the association was the only party in position to contest the legality of the transaction, and therefore that she was bound to carry out the trust.

In *Overhiser v. Overhiser,* 14 Colo. App. 1, the Ancient Order of United Workmen issued a benefit certificate to George Overhiser in which his wife was named as beneficiary. She obtained an absolute divorce from him, but he made no change in the beneficiary. The court held that obtaining a divorce by the wife was not the legal equivalent of the death of the beneficiary so as to give the heirs any right to the fund.

I am of the opinion that the decision of this court in *Giffin v. Grand Lodge, A. O. U. W.,* 99 Neb. 589, was

wrong, and that it should be overruled. The lodge waived all objections.

But whether the opinion was wrong in the foregoing case or not, that case was different from this one. In this case the fraternal beneficiary association was a corporation of the state of Iowa. The action was brought by Anton Dworak to recover the proceeds of the certificate. The defendant association admitted the indebtedness and paid the money into court for the benefit of the person or persons who might be entitled to it. That was a waiver of objections. In the majority opinion it is said: "The only question necessary to determine is whether the statutes of Iowa and by-laws of the association govern the disposition of the fund, or whether this is controlled by the laws of the state of Nebraska. If the former apply, the beneficiaries named, the divorced wife and her children, are entitled to the money; if the latter, the children of Dworak are entitled to it."

The certificate issued to Joseph Dworak provided that upon his death the sum of $1,000 would be paid to his wife, Marie Dworak, and his stepchildren, Milton Dworak and Stanley Dworak. He had children by a former marriage, but no children by his second marriage. When divorced from his wife, Marie Dworak, it is claimed that he ceased to reside with her and her children. There was a trial upon an agreed statement of facts by which it appeared that the application for membership was sent by the officers of the local lodge at Omaha to Cedar Rapids, Iowa, where the certificate was made out and signed by the supreme officers. They then sent the certificate to the subordinate lodge in Omaha, and it was then signed by the officers of the local lodge and delivered to the insured. The divorce appears to have been granted to Marie Dworak in February, 1911. The Iowa statute is shown by the majority opinion to provide: "No fraternal association created or organized under the provisions of this chapter shall issue any certificate of membership to any person under the age of fifteen years, nor over the age of sixty-five years, nor unless the

beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir or legatee of such member."

In *White v. Brotherhood of American Yeomen,* 124 Ia. 293, the supreme court of Iowa, in construing section 1824 of the Iowa Code, where a certificate was issued by a fraternal association payable to a certain person by name, such person being the wife of the member when the certificate was issued, and subsequently she was divorced, and the member remarried, but made no change of beneficiary, held, that on the death of the member the first wife was entitled to the proceeds of the certificate. Here is the business being transacted in an Iowa association where the supreme lodge issues the certificate to another state, but the courts of the state of Iowa have held that the person named in the certificate as beneficiary would be entitled to recover. That being the case, it would appear that there is but little jurisdiction left in our court to undo what has been done by the supreme lodge at Cedar Rapids, Iowa, and what has been decided by the supreme court of Iowa. It does not seem to me that we ought to be called upon to disregard the laws of Iowa or the certificate issued by the Iowa supreme lodge. It is maintained in the majority opinion that the Nebraska statute should apply, although the association is an Iowa association. The Iowa decisions are to the effect that the person who becomes a beneficiary has his status determined by the statute of Iowa at the time the certificate is issued. With this in force, it seems that the decision in this case is in utter disregard of the Iowa statute, and is also in disregard of the decisions of the Iowa supreme court. In this case the lodge waived any defect there might be in the claims of Marie Dworak, Milton Dworak, and Stanley Dworak, and their adversary claimants, and paid the money into court to be there disposed of as the court might order and adjudge. Marie Dworak, Milton Dworak and Stanley Dworak filed a joint answer and cross-petition to the petition of Anton Dworak. They admitted that they were beneficiaries named in the certificate

at the time it was issued, and that Joseph Dworak died on the 28th day of August, 1912. They denied that Joseph Dworak in his lifetime changed the beneficiaries under the policy in favor of the plaintiff. The trial court decided that any attempted change of beneficiaries by Joseph Dworak was not successful, and decided against Anton Dworak, and decided that Marie Dworak had been divorced from Joseph Dworak sometime before his death, and that she was ineligible to take as a beneficiary, and that her children, Milton and Stanley Dworak, were not members of Joseph Dworak's family at the time of his death, and therefore were ineligible to take as beneficiaries. The judgment was given in favor of the children of Joseph Dworak by his first wife. In the stipulation it is agreed that the supreme court of the state of Iowa in the case of *White v. Brotherhood of American Yeomen, supra,* announced the following rule: "Code, sec. 1824, provides that no fraternal association shall issue any certificate unless the beneficiary be the husband, wife, relation, legal representative, heir, or legatee of such member. An association which expressed its object to be the bestowal of financial benefits on the family, widow, heirs, relations, and such others as may be permitted by the laws of the state, and the constitution and by-laws of which permitted a change of beneficiary, issued a certificate payable to a certain person by name, such person being the wife of the member when the certificate was issued. Subsequently she was divorced, and the member remarried, but made no change of beneficiary. *Held,* that on the death of the member the first wife was entitled to the proceeds of the certificate." (99 N. W. 1071.) Under the foregoing ruling, it would seem that Marie Dworak and her children would be entitled to the judgment. A judgment against them would be in disregard of the certificate.

As I understand it, we are asked to disregard the statement of the certificate as to the beneficiaries therein named, to disregard the method of doing business adopted by the Iowa supreme lodge, and we are also called upon to dis-

regard the laws of Iowa and the decisions of its courts. That the objections that might be made are waived, see Bacon, Benefit Societies (3d ed.) sec. 308, and citations.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. WEBSTER COUNTY ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19556.

Taxation: ASSESSMENT: RAILROAD ACCESSORIES. A pipe line connecting springs with a water system established and operated by a railroad company, owner, for general railroad purposes at a station and roundhouse, and the necessary land around the springs, should be assessed by the state board of equalization and assessment, and not by the county board of equalization, though the property described is not within the regular railroad right of way and station grounds. Rev. St. 1913, secs. 6375-6377.

APPEAL from the district court for Webster county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Byron Clark, Jesse L. Root and *L. H. Blackledge,* for appellant.

Frank J. Munday, contra.

ROSE, J.

This is an appeal by the Chicago, Burlington & Quincy Railroad Company, plaintiff, from an order of the district court for Webster county sustaining an assessment made by the county board of equalization. The property assessed is owned by plaintiff and consists of three acres of land with springs thereon and 10,891 feet of water pipe connecting the springs with a water system established and operated by plaintiff for general railroad purposes at the station and roundhouse at Red Cloud. The springs are in Webster county outside of the regular right of way and outside of the city limits of Red Cloud. For the pipe line plaintiff acquired a right of way 25 feet wide. Water not needed for railroad purposes is at times diverted to the Red

Cloud water plant, but this seems to be a gratuitous service. The assessment was made for both 1914 and 1915, the property not having been taxed for the former year. Plaintiff contends that the county board of equalization had no authority to assess the property described, since the statute provides that it shall be assessed by the state board of equalization. In support of this contention plaintiff relies on the following provisions of statute:

"The state board of equalization and assessment is hereby empowered, and it is made its duty, to assess all property of the railroads and railroad corporations in the state of Nebraska; Provided, however, all machine repair shops, general office buildings, store houses, and also all real and and personal property outside of right of way and depot grounds as of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies with the assessors of any precinct of the county where such real or personal property may be situated." Rev. St. 1913, sec. 6375.

"The board on the first Monday in May in each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which, for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, road-bed, right of way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with the moneys, credits, franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided." Rev. St. 1913, sec. 6376.

The statute also requires each railroad company, on or before April 15, to report to the state board of equaliza-

tion and assessment: "A complete list giving size, location as to county, township and city and village, material and value of all depots * * * or other buildings situated wholly or in part on the right of way, together with all platforms, fuel and water stations, and the machinery and tanks connected therewith." Rev. St. 1913, sec. 6377, subd. 3.

On the other hand, the county contends that the property assessed does not come within the class described as "right of way and depot grounds, and all water and fuel stations * * * thereon."

The statute provides further: "The state board shall transmit to each county, as soon as practicable after receiving returns from the railroad company, a statement from such returns showing as to each county and railroad, all machine and repair shops, general office buildings, store houses, and also all real and personal property outside of such railroad right of way and depot grounds, not included in the property herein required to be assessed by the state board of equalization." Rev. St. 1913, sec. 6385.

In a literal sense the property in question is not right of way or depot grounds or water stations thereon. Within the intent of the statute, however, the property belongs to the class required to be assessed by the state board. The law makes it the duty of that body to assess "all property of the railroads" in this state. Rev. St. 1913, sec. 6375. There is an exception in the form of a proviso whereby "all machine repair shops, general office buildings, store houses, and also all real and personal property outside of right of way and depot grounds" shall be assessed by the local authorities. The statute adopts the following theory of taxation:

"A railroad, for the purpose of assessment and taxation, is considered as an entity, and includes all property that is held and used principally in the operation of the road and carrying on the business of transportation." *Chicago, B. & Q. R. Co. v. Box Butte County,* 99 Neb. 208.

A pumping station and a water tank constructed and used for railroad purposes on depot grounds are assessable by the state board. In the present instance plaintiff, for reasons of economy or efficiency, no doubt, adopted a different system to secure a water supply. The property is "used principally in the operation of the road and carrying on the business of transportation." Plants at different stations for the furnishing of water constitute a part of the railroad as an entity. The property in question should be assessed by the state board, and not by the county board.

The assessment in the present instance, however, should not be disturbed on appeal. The property in question was not reported to or assessed by the state board either in 1914 or in 1915. Having failed to report the property to, or to have it assessed by, the state board, plaintiff should not complain of the county board for placing it on the local tax list. The property was taxable, and plaintiff should not escape its proportion of the burden of taxation. *Chicago, B. & Q. R. Co. v. Merrick County*, 36 Neb. 176.

AFFIRMED.

GEORGE URBACH ET AL., APPELLANTS, V. CITY OF OMAHA, APPELLEE.

FILED MAY 19, 1917. No. 20015.

1. **Constitutional Law: CITY ORDINANCE: REMOVAL OF GARBAGE.** A city ordinance defining garbage to include "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables," and prohibiting its removal through the streets or alleys by any one not employed by the city for that purpose, is not unconstitutional as taking the property of a restaurant proprietor for public use without just compensation or as depriving him of his property without due process of law, though the regulation may prevent him from selling garbage as feed for swine.

2. ———: ———: RIGHT TO QUESTION. Parties whose constitutional rights are not affected will not ordinarily be permitted to challenge the constitutionality of a law on the ground that it may operate in other respects to deprive other persons of their constitutional rights.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

H. Fischer, William Sternberg and *J. Gerald Mac Veigh,* for appellants.

John A. Rine and *W. C. Lambert, contra.*

ROSE, J.

This is an action to enjoin the city of Omaha from enforcing an ordinance prohibiting any one not employed by the city for that purpose from hauling garbage through the streets and alleys. Plaintiff King is the proprietor of a restaurant and sells the waste from his kitchen to plaintiff Urbach who hauls it beyond the city limits as feed for swine. It is alleged in the petition that the garbage is valuable feed for swine, and that the ordinance, in preventing King from selling it, violates the state and federal Constitutions, which prohibit the taking of private property without due process of law or for public use without just compensation. U. S. Const., Amend. XIV, sec. 1; Nebraska Const., art. I, sec. 21. Defendant demurred to the petition. The demurrer was sustained. From an order denying an injunction and dismissing the action, plaintiffs have appealed.

The ordinance makes it a misdemeanor for any one not employed by the city for that purpose to remove or haul any garbage through the streets or alleys; provides for the collection of garbage by city employees; requires every housekeeper, or occupant of any building, and the proprietor of any hotel, restaurant, café and boarding house to place all garbage in proper receptacles reasonably accessible to the garbage collector; and defines "garbage" to include "every refuse, accumulation of animal, fruit or vegetable matter

that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables."

The question presented is whether the enactment of the ordinance was a proper exercise of police power. Plaintiffs cite *Whelan v. Daniels,* 94 Neb. 642, in which it was held that an ordinance declaring that dead animals found within the city become the property of the contractor employed by the city to remove them was void as taking private property without just compensation. The decision was based on the propositions that a dead animal may be valuable property, that it is not a nuisance *per se,* and that its owner should be given a reasonable opportunity to remove it before it becomes a nuisance. In other cases it has been held that substances which are nuisances *per se* may "be removed by the city, in its exercise of lawful authority, for the protection and preservation of the health, comfort and welfare of the inhabitants." *Iler v. Ross,* 64 Neb. 710, 717; *Smiley v. MacDonald,* 42 Neb. 5. In the present case the ordinance deals with garbage, which it defines to include "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables." Under the police power of the city, garbage, thus defined, may be treated as a nuisance *per se. Smiley v. MacDonald,* 42 Neb. 5; *Iler v. Ross,* 64 Neb. 710; *City of Grand Rapids v. De Vries,* 123 Mich. 570; *State v. Robb,* 100 Me. 180; *O'Neal v. Harrison,* 96 Kan. 339; *California Reduction Co. v. Sanitary Reduction Works,* 199 U. S. 306; *Gardner v. Michigan,* 199 U. S. 325.

These cases are in harmony with the following statement of the law: "The removal and disposal of garbage, offal, and other refuse matter is recognized as a proper subject for the exercise of the power of a municipality to pass ordinances to promote the public health, comfort and safety. The natural scope of an ordinance on this subject is confined to discarded and rejected matter, i. e., to such as is no longer of value to the owner for ordinary purposes of domestic consumption. If the matter in question has not

been rejected or abandoned as worthless and is not offensive in any way to the public health, it does not come within the natural scope of such an ordinance. Garbage matter and refuse are regarded by the decisions as inherently of such a nature as to be either actual or potential nuisances. By reason of the inherent nature of the substance, it is therefore not a valid objection to an ordinance requiring disposal in a specified manner that garbage has some value for purposes of disposal, and that the effect of the ordinance is to deprive the owner or householder of such value. That the owner suffers some loss by destruction or removal without compensation is justified by the fact that the loss is occasioned through the exercise of the police power of the state, and the loss sustained by the individual is presumed to be compensated in the common benefit secured to the public." 2 Dillon, Municipal Corporations (5th ed.) sec. 678.

Plaintiffs further contend that the ordinance is void because it prohibits the owner of garbage from feeding it to fowls or animals on his own premises. Whether this is a proper construction of the ordinance and whether, thus construed, it is unconstitutional are questions not necessary to a decision. It is not shown that plaintiffs have been prevented from making such a use of the garbage. King complains because his right to sell garbage has been invaded, and the petition does not show that he does, or desires to, feed the garbage to fowls or animals on his own premises. Urbach complains because the ordinance denies him the right to purchase and remove garbage produced on the premises of others. The rule is that parties whose constitutional rights are not affected will not ordinarily be permitted to challenge the constitutionality of a law on the ground that it may operate in other respects to deprive other persons of their constitutional rights. *State v. Brandt,* 83 Neb. 656; *Cram v. Chicago, B. & Q. R. Co.,* 85 Neb. 586; *State v. Stevenson,* 18 Neb. 416; *Jeffrey Mfg. Co. v. Blagg,* 235 U. S. 571.

The ordinance is not unconstitutional for the reasons advanced by plaintiffs. The judgment of the district court is therefore

AFFIRMED.

HAMER, J., dissenting.

The plaintiff King is the proprietor and owner of a café situated in the city of Omaha, Nebraska, in which he serves meats, fish, fowl, fruits, vegetables and other food to his patrons. He claims the right to dispose of the unused left-over product as he sees fit. It is placed in a receptacle provided for that purpose. It is stipulated that the food not used is not decomposed, putrid, rotten or offensive when it is put in the receptacle, and also that it has a property value to the plaintiff King. It further appears that King sells the said material to the plaintiff Urbach who removes it from the King premises twice daily. The admitted value of the material sold by King raises an important state and federal question which I will hereafter attempt to discuss whether the property is taken by the city without due process of law.

The city of Omaha passed an ordinance by which it undertakes to take away from the restaurant keeper, the plaintiff King, and others similarly situated, including all the householders in the city, the right to dispose of their garbage to a customer purchasing the same and removing it from the premises. It is claimed on behalf of the defendant that under the ordinance the plaintiff King is prohibited from selling said garbage to the plaintiff Urbach, and that Urbach is prohibited from hauling the same through the streets of Omaha, even though the wagon used for that purpose is sufficient to remove said garbage in a sanitary way and without giving offense to the eye or nostril or in any way endangering the public. The ordinance provides that the city of Omaha shall remove the garbage, and that it shall haul the same in a good and substantial water-tight iron tank, or iron bed, securely inclosed with a sufficient covering so as to prevent the escape of the contents thereof,

or may haul the same in tight wooden boxes lined inside and out with iron or steel securely riveted and so as to be water tight. The ordinance provides that there shall be painted on the wagon used the words "City Garbarge Wagon," and that it shall be unlawful for any person to have or use upon the streets of Omaha any wagon so painted unless such person shall be an employee of the city engaged to remove or dispose of such garbage. There is also a provision that the housekeeper or occupant of any building in the city of Omaha and the proprietor of any hotel, restaurant, café, boarding house and eating house shall place their garbage in a suitable sheet iron or galvanized can with a tight cover provided at their own expense, and that such receptacles shall be placed near the alley in the rear of the premises. The ordinance defines garbage to mean "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables." There is a fine provided for the violation of any of the provisions of the ordinance of not less than $10 nor more than $50.

The plaintiff Urbach is stipulated to be engaged in the business of feeding hogs near the city of Omaha, and also it is stipulated that he purchases said garbage from the owners thereof, and that he takes the same to his feed yards and feeds it to his hogs; that this business is his sole means of a livelihood; that the city of Omaha interferes with the business of said Urbach and the plaintiff King by arresting and incarcerating Urbach and threatens so to continue.

The petition of plaintiffs prayed to enjoin the enforcement of the ordinance. There was a demurrer filed by the city of Omaha to the petition of the plaintiffs, which petition sets forth the foregoing facts. The court sustained the demurrer of the defendant city and rendered judgment in its favor and against King and Urbach.

It is contended by the plaintiffs that the city of Omaha did not possess the power to pass the ordinance; that it is

unreasonable and interferes with property rights and with the liberties of the plaintiffs; that it works confiscation of the plaintiffs' property without due process of law; that by the classification made by the ordinance certain matters which are not nuisances are made matters of nuisance; that the ordinance attempts a prohibition, and not a regulation, and regardless of any necessity for prohibition or for regulation of the subject-matter over which it assumes to act; that the ordinance creates a monopoly by which the plaintiffs are deprived of their property without compensation. It is claimed by the defendant that the ordinance is within the scope of the police power and is in every way valid. No evidence was taken, and therefore the case stands upon the demurrer to the petition and the stipulation admitting the truth of the facts stated.

It is contended by the plaintiffs that private property shall not be taken without compensation; that to deprive the plaintiffs of their garbage as long as it has a property value and is not a nuisance is an unreasonable exercise of the police power and is in violation of the principles of constitutional law. It is said that the ordinance is confiscatory. Omaha is supposed to be a city of 200,000 people. It covers a large area, sufficient to contain 1,000,000 inhabitants. Many of its residents are poor people depending in part for their livelihood upon the use of gardens and vacant lots. Some have a team of horses to plow them, also the use of a cow in some localites, and some raise chickens. Omaha is a city of many small home builders. It is claimed that this ordinance reaches the little homes of many people who need to use the scraps from the kitchen table for the benefit of their chickens; that in places of the city of Omaha where the family cow may be found the potato peelings may not be given to her without endangering the safety of the family by arrest; also that prosperous restaurant keepers may not suffer as much as the occupant of the small home, because the proprietor may receive enough from his patrons to sustain him, but the laborer with his possible family cow and his possible chickens is in

danger of doing without eggs and butter; and that he and his family may suffer in consequence of the enforcement of the ordinance. It is emphasized that the ordinance is in thoughtless disregard of the rights of the people of the city belonging to all classes, and especially the poor. The ordinance extends to "every housekeeper or occupant of any building in the city of Omaha." There are probably 40,000 homes in Omaha. If each of these homes should lose $10 in a year because of this ordinance, the sum lost would amount to $400,000. One of the peculiar things about this ordinance is that it makes it unlawful for any person to put in the garbage can, or receptacle, ashes, tin cans, broken glassware or crockery, or any refuse other than "garbage." The "garbage" is apparently to be left in such condition that it can be eaten by animals. Of course, it could not be eaten if it contained broken glass or crockery or ashes and tin cans. I do not suggest that the purpose is to give this garbage to some political favorite of the city management, or some one person who has a valuable perquisite not known generally to the public, or to the city officers. It will be readily seen that there could be a job of that kind, but in this case there was no evidence taken, and therefore we may not know "what is what" behind the scenes. Why is the broken glass and broken crockery to be kept out of the garbage can? If the stuff was merely to be hauled away and dumped in a safe place they could do no harm. Of course, we may not be able to shut our eyes to the possibilities of this plan. If the garbage is removed at the expense of the city, then there might be a little dot in this arrangement amounting to many thousands of dollars, and more than the salaries of all the state officers, including also the congressmen. Why should the laborer or the clerk with his little home and his possible cow and chickens be deprived of the waste which he can make very useful to himself and his family? Eggs and milk and butter will tend to make the children well and strong. It will put the rosy bloom of vigorous health in their

cheeks. The disposition of this case is something to the advantage or disadvantage of every householder in Omaha, including also all the hotel and restaurant keepers, and many of the dealers in fruits and vegetables.

In the brief of counsel for the appellants it is stated that there are in Omaha numerous wholesale food merchants handling great quantities of perishable foods, and that in the spring and summer immense shipments of fruit, melons, eggs and vegetables are handled, picked over, sorted and reshipped throughout the great Missouri valley, and that in handling this stuff a large amount of articles unsuitable for shipment are culled from original shipments with the result that many tons of culled fruit, melons, eggs and vegetables are left; that immediately the city of Omaha steps in and takes the salvage from the hands of the owner and bestows it upon the contractor who has agreed to pay the city the sum of $1,000 a year for the privilege of being able to demand and receive food which in one good day is said to be worth more than the sum he pays for the entire year, and that the commission merchant has no recourse but to deliver over; that no demand is necessary; that he is guilty of a misdemeanor if he fails to provide receptacles and put the culls in the cases; that he is not allowed to feed the culls to hogs of his own, nor to sell them to another, and that the purpose is to provide the contractor with a great amount of valuable material without expense to him; that one is not permitted to burn the garbage in an incinerator; that it must be turned over to the contractor.

It is also said in the brief that the ordinance does not say, "Place in a receptacle convenient for removal or otherwise dispose of the same in the manner provided by the board of health (or other proper officer)," but proclaims that the contractor has an indefeasible right to "every refuse, accumulation of animal, fruit or vegetable matter that attends the preparation, use, cooking or the dealing in or storage of meats, fish, fowl, fruits or vegetables." The ordinance is somewhat artfully drawn because the purpose perhaps is hidden under what appears to be an innocent

definition, but it includes the language quoted, and takes the articles mentioned from the owner. In the city there are many butcher shops in which fats, oils, tallow, scraps of meat and bones accumulate. These things may be collected and reduced to useful products, though not fit for food. They can be made into lubricants and soap, and perhaps other things. According to this ordinance, no hotel owner, no restaurant proprietor, may take these scraps through the streets of Omaha to his hogs or his chickens. This sort of thing is confiscation because in the stipulation it is said that the scraps and remnants "are not decomposed, putrid, rotten or offensive when put in said receptacle." It is proposed to take from the owners of the property things of substantial worth, and, under the claim that it is necessary, the ordinance hits everybody.

We seem to have disposed of the questions involved in this case in the following cases: *Smiley v. MacDonald,* 42 Neb. 5; *Iler v. Ross,* 64 Neb. 710; *Whelan v. Daniels,* 94 Neb. 642. They are all garbage cases.

In *Smiley v. MacDonald,* this court laid down a general rule which ought not to be lost sight of: "It may, however, with safety be asserted that the legislature cannot under the guise of police regulations arbitrarily invade personal rights and private property." If we apply the rule here laid down to the instant case, it probably requires a disposition of it in favor of the plaintiffs. At the same time it is proper to remark that the removal of noxious and unwholesome matter tends directly to promote the public health and the comfort and welfare of the people. The health of the people is above every other consideration, and all steps necessary to secure its maintenance should be taken. But this brings us to the question of whether the ordinance of the city goes further than is necessary. It raises the question whether the man who buys the garbage may not be regulated in his manner of removing it with the same strictness and efficiency required of the city contractor. Why should he not keep just as good and safe a

wagon as the city contractor and operate it just as well and with as much care?

In *Iler v. Ross, supra,* section 1 of the ordinance there under consideration provided that any person who shall collect or remove any dead animals, garbage, ashes, filth, offal, night soil or other refuse matter within the corporate limits of the city of Omaha, not having a contract with said city so to do, shall be deemed guilty of misdemeanor, and upon conviction thereof shall be fined not less than $5 nor more than $20. The relators in that case had been convicted of unlawfully collecting and removing garbage, ashes, filth and other refuse matter, without having a contract with the city, and contrary to the provisions of said section 1. They sought relief by *habeas corpus.* This court said, among other things: "If the city is empowered to enact an ordinance providing that a contract shall first be entered into with it before any person is authorized to do any of the things prohibited, it follows as a legal sequence that the city may grant an exclusive right to one individual with whom it may enter into a contract and refuse to contract with all others; that is, if it is authorized to contract at all, it may lawfully contract with one or more, as may best suit its own views as to the propriety, necessity and terms upon which it will enter into such contractual relation with another." In that case the word "garbage" was defined by the ordinance to mean "all refuse matter, animal or vegetable." It is there said that the right of a city under charter acts such as the one quoted to make all needful rules and regulations for the proper collection and removal of all forms of rubbish, waste and other refuse matter where the population is in a small territory and in order to protect the health of the inhabitants seems a proposition so plain as not to require discussion. Such regulation was clearly contemplated by the legislature. It is said: "In fact the preservation of the health and safety of the inhabitants is one of the chief purposes of local government, and reasonable by-laws in relation thereto have always been sustained

in England, as within the incidental authority of such corporations"—citing *Boehm & Loeber v. Mayor and City Council of Baltimore,* 61 Md. 259. The court also quotes *River Rendering Co. v. Behr,* 7 Mo. App. 345, where it was said: "The municipal legislature is especially charged with the preservation of the public health. That high duty lies in prevention rather than in cure. It would be poorly discharged, or not discharged at all, if the surest and most well-known precautionary measures were not thoroughly put in practice against the introduction of disease."

The court also cited *Alpers v. City and County of San Francisco,* 32 Fed. 503. After these citations and quotations, this court said: "Can an ordinance be upheld and justified as broad and of so sweeping a character as the one under consideration, which includes all accumulations of ashes, stable manure, rubbish, debris, etc., many different kinds of which may properly be regarded of some utility to the owner or others and which are not *per se* noxious and harmful? Is a city empowered to contract with one individual, and authorize him exclusively to go upon the private premises of the inhabitants, collect and remove at the owner's expense all such substances, and to make it a penal offense for another to engage in the performance of the same kind of labor? Can the city, merely by its fiat, declare all and every substance of the kind mentioned nuisances, and direct their abatement and removal through the agency of an exclusive contractor?" The court then quotes what is said in *Smiley v. MacDonald, supra,* concerning the limitation of the power of the legislature preventing it from arbitrarily invading private property or personal rights; also calls attention to the fact that stable manure has a value for the purpose of fertilizing lawns and gardens, and is highly prized by the thrifty husbandman in agricultural communities because it enriches the soil and increases the yield of crops, and that cinders and ashes are regarded as useful for many purposes. It is then said: "The ordinance not only grants a monopoly, always odious in the eye of the law, without

justification or necessity therefor as a sanitary measure for the protection and preservation of the public health, comfort and welfare, but is also (always) an unwarranted invasion of the natural rights of the inhabitants of the city. It is true the banker, the merchant and the lawyer may remove from their own premises, and with their own teams, stable manure, but nothing else. The man without a team and the one who desires to earn an honest living in removing for others these things which are not in themselves injurious to health are completely debarred. * * * Not only is the owner's property taken from him when he could perhaps dispose of it or make arrangements for its disposal to some advantage, but he is compelled to bear the expense of the taking. We cannot believe such an ordinance can be justified and upheld by the application of any sound principle of law."

In *Whelan v. Daniels,* 94 Neb 642, it was held: "The owner should be permitted to remove such animals or to cause the same to be removed within a reasonable time fixed by such municipality, and be allowed to receive the value thereof, or to put the same to a beneficial use." In the body of the opinion it is said: "The officers of the city must be allowed a large discretion in determining when and how such garbage must be disposed of, but the rights of property in the individual must not be unnecessarily violated." This court held, as stated in the syllabus: "The city of Omaha by an ordinance, in effect, declared that the carcasses of all dead animals found within the city, which were not slain for food, should at once become the property of the public contractor, whose name was contained in the ordinance; such ordinance is void, so far as it attempts to take private property without due process of law."

The ordinance under consideration is quite as sweeping as the ordinance in *Whelan v. Daniels.* In the instant case the language is not the same, but the effect is quite as drastic. In that case the law as declared by this court permitted the owner to remove the dead animal or to cause

the same to be removed within a reasonable time to be fixed by the municipality, and to be allowed to receive the value thereof, or to put the same to a beneficial use. The left-over part of a meal is perhaps quite as cleanly as the part that has just been eaten. If in the case of *Whelan v. Daniels* the owner of the dead animal was declared to have a reasonable time in which to remove it, or to apply it to a beneficial use, then the application of the same rule to the instant case does not in any way hinder the owner from removing what is of value to him, nor prevent him from selling it and realizing its value. The fallacy in the contention made on behalf of the defendant city is that only the contractor can safely be trusted with the removal of the matter to be taken away. I do not see why the man who purchases the refuse and undertakes to remove it may not be treated just as strictly as the city contractor. The power to pass by-laws gives authority to pass the same when they are reasonable in their character, within the scope of municipal authority, and not repugnant to the Constitution and general laws of the state. *State v. Ferguson,* 33 N. H. 424. It is no part of the franchise of municipal corporations to change the meaning of English words. *Mays v. City of Cincinnati,* 1 Ohio St. 268; *Henback v. State,* 53 Ala. 523. This being the case, left-over food of value cannot be discredited by calling it "garbage."

In England every by-law must be reasonable, and not inconsistent with the character of the corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property. *Feltmakers Co. v. Davis,* 1 Bos. & P. (Eng.) 98; *Sutton's Hospital,* 5 Coke (Eng.) pt. 10, p. 1; *City of London v. Vanacker,* 1 Ld. Raym. (Eng.) 497.

In the United States an ordinance passed in virtue of implied power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws of the state. *Davis v. Town of*

Anita, 73 Ia. 325; *Yick Wo v. Hopkins,* 118 U. S. 356; *Trustees of Schools v. People,* 87 Ill. 303; *In re Frazee,* 63 Mich. 396; *Clason v. City of Milwaukee,* 30 Wis. 316; *Ex parte Frank,* 52 Cal. 606; *State v. Higgs,* 126 N. Car. 1014; *Mayor of Memphis v. Winfield,* 27 Tenn. 707. The ordinance in the last case directed watchmen to arrest any free negro or slave that they might "find out after 10 o'clock (at night) and lodge them in the calaboose, there to remain until next morning." In addition, if the negro arrested was a slave, he or she was to receive ten lashes "on their naked backs." It is apparent that sometimes the ordinances of the past have been oppressive, while professing to be for the good of the community and the enforcement of proper conduct.

FOSTER M. SHICK, APPELLEE, V. FREDERICK H. JOHNSON, APPELLANT.

FILED MAY 19, 1917. No. 19176.

1. **Master and Servant:** ACTION FOR INJURY: DEFENSES: ASSUMPTION OF RISK: WAIVER. In an action by an employee for damages caused by an injury incurred in attempting an act of unusual danger, if the defense is that the danger was open and notorious, and that the plaintiff assumed the risk, and if the evidence shows that the plaintiff protested against performing the service on account of the apparent danger, and that the defendant peremptorily ordered him to perform it, the defendant will be held to have waived the defense of assumption of risk.

2. ———: ———: NEGLIGENCE: EVIDENCE. When the sole ground of negligence alleged and relied upon is that the danger was known to the defendant, and was unknown to the plaintiff, and could not have been observed by him in the exercise of ordinary care and diligence, it is not necessary to prove that the defendant peremptorily ordered him to perform the service over his protest. It is sufficient in that regard if the service rendered was in the line of plaintiff's employment and was consented to by defendant without notifying plaintiff of the hidden danger.

3. ———: ———: ISSUES: INSTRUCTIONS. When the petition in such case contains allegations that the defendant did many things negligently, without alleging any facts that would amount to actionable negligence except in one particular, it is erroneous to give the whole petition in charge to the jury, and instruct them that if they find defendant guilty of any act of negligence alleged in the petition they shall find for the plaintiff.

4. ———: ———: ———: ———. The court in its charge to the jury described an alleged act of the defendant that was not of itself counted upon as negligence justifying a recovery, from which the jury might infer that if that act was proved they should find for the plaintiff. This was erroneous.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

James C. Kinsler, for appellant.

McLaughlin & Neely, contra.

SEDGWICK, J.

Foster M. Shick, an employee of Frederick H. Johnson, recovered a judgment against Mr. Johnson in the sum of $13,750 for damages caused by an injury while he was in Johnson's employment. Johnson was insured as an employer by the Casualty Company of America, and the suit against him was defended by the company. Afterwards an appeal was taken to this court, but no supersedeas bond was given. Proceedings were begun against Mr. Johnson to enforce collection of the judgment, and thereupon he settled with the plaintiff by giving him two promissory notes, one in the sum of $5,000, the amount for which the Casualty Company had insured him, and the other for the remainder of the judgment. Mr. Shick then dismissed the appeal. Upon motion and showing, the court found that, by the terms of the policy of insurance, it was agreed that the company should defend in the name of the insured any action against him in which the company would be liable under the terms of its policy, and that the company had so defended the action and in the name of the insured had taken the appeal. The motion of the company for rehearing of the order permitting the dismissal of the appeal was

sustained. The order dismissing the appeal was "set aside, case to be determined in its regular order." The case was argued and submitted upon its merits.

The defendant is a contractor and builder, and the plaintiff was in his employ. The action is to recover damages for an injury sustained by the falling of a beam and column that the plantiff and other employees were attempting to place. The plaintiff in his brief states the conditions surrounding the accident as follows:

"During the month of July, 1914, the appellee was at work with two other men in the basement of a building in the process of construction in the city of Omaha. The three men were employees of the appellant, and were engaged in the erection of iron I beams in the aforesaid building. The three men had set the first iron column in place on its foundation, and had just raised the first I beam and landed it in place so that one end rested on the brick wall at the west side of the building, and the other end rested on the west bracket of the first iron column. * * * After this first I beam had been hoisted into place, wooden braces were placed against it, one on each side, for the purpose of bracing it firmly in order to prevent it from toppling over. The upper end of each of the planks, which were used as braces, was put in the angle between the web and the upper flange of the I beam, and the lower end was driven or pushed into the ground. One of these wooden braces was placed opposite each other on each side of the I beam, a short distance west of the first column. After the work had reached this stage, the appellee or plaintiff injured his finger while he was endeavoring to move an I beam lying on the ground, and immediately left the excavation and went up onto the street in order to have his finger dressed. The foreman, Frank Painter, and the other workman, Ernest H. Peters, remained in the basement while the plaintiff went up onto the street. While the plaintiff was absent from the basement, the foreman and Peters moved the derrick, which had been used in hoisting the first I beam into position, from the place

where it had been when the plaintiff left the basement to have his finger dressed, to a position farther east, in order that the derrick would be in position to hoist the second I beam into its proper place. In moving the derrick, the plaintiff claimed that the wooden braces, which had been placed against the first I beam, as hereinbefore set out, had been taken down in order to get the derrick by, and were not put back into place. The plaintiff was absent from the excavation a few minutes (about ten), and when he returned to the basement he found that the derrick had been moved by the foreman and the other workman, as stated above. The second column was then put in place, and the raising of the second I beam was commenced. The foreman, Painter, stood a short distance east of Shick, taking the slack off from the drum forming a part of the derrick, and Peters was directed to turn the windlass, by which the I beam was raised. The plaintiff stood upon the ground and steadied the I beam by holding his hand on it, as it was hoisted, preventing it from striking against the columns as it ascended. After the I beam had been hoisted to the required height, it was necessary to land it on the brackets attached to the first and second iron columns. This was the work assigned to Shick, and, as soon as the I beam had reached the desired height and the hoisting process had stopped, the foreman nodded to Shick, indicating, as the plaintiff claimed, that it was time for him to commence his work of landing the beam on the column in its proper position. Immediately upon perceiving the foreman's nod, Shick turned around and started to climb up the first iron column in order to connect the beam to the column. While he had hold of the column, it swayed and toppled over on him before he could get out of its way. * * * When he returned to the basement, * * * the plaintiff testified that he did not observe or know that the master had removed the wooden braces which held the beam and column in a secure and steady position, and that no one called his attention to the fact that the braces had been removed. After the second I beam had been

raised to the required height, and the foreman indicated by a nod of the head that the time to connect the beam to the column had arrived, Shick promptly proceeded to perform his duty. He was crushed by the collapse of the beam and column, due to the absence of braces."

When the plaintiff was testifying as a witness in his own behalf, he was questioned, and answered, as follows: "Q. Then, * * * after the beam had been raised so you could hardly touch it any more, what did Painter do? A. Well, Peters stopped turning, and Painter kept hold of the line and nodded his head to me, and I turned around and started to climb the column. Q. Now, Mr. Shick, with the situation as it was there, with the beam up as high as you could reach, or a little higher, and Mr. Peters having stopped turning the crank, and Mr. Painter facing the work and giving you that nod, what did that nod mean to you? A. That was an order for me to connect the beam to the column." The defendant objected to all of this evidence as incompetent and immaterial, and now insists that "it was wholly immaterial what the condition of the plaintiff's mind may have been at the time as to whether the alleged nod of the foreman meant anything to him, or what it meant, or 'what he understood it meant to himself,' or 'how he interpreted it to himself.'" If the plaintiff knew the existing conditions and the danger involved in attempting to climb this column under the circumstances, and had protested to the foreman against performing such a service on account of the danger, and was now relying upon the order of the foreman to proceed and climb the column for the purpose indicated notwithstanding the apparent danger in doing so, to support such a cause of action it would be necessary to prove that the foreman intended to and did give such order. Such an order of the foreman under such circumstances would preclude the defendant from availing himself of the defense that the plaintiff assumed the risk of such apparent dangers. But the plaintiff did not bring his action, and does not now present it, on any such theory. He alleged in his

petition: "That solely and entirely by reason of the carelessness and negligence of the defendant and its duly authorized foreman, Frank K. Painter, in removing the above described props, and in carelessly and negligently failing to warn or advise the plaintiff of the unsafe and dangerous condition which had been created, and of the danger arising as a result of the removal of the said props or braces, and without any negligence or carelessness on the part of the plaintiff whatsoever, said plaintiff was injured as hereinafter set forth." And he says in his brief: "The statement that the plaintiff was ordered to climb up the iron column was a mere incident, and the plaintiff's case does not in any way depend upon the question of whether or not such order was given. The negligence complained of was that the defendant, acting through its foreman, failed to notify the plaintiff of the removal of the braces after he returned from the street, and the further fact that the foreman permitted and allowed the plaintiff to climb up the iron column without warning or advising him of the removal of the props, and of the dangerous and unsafe condition of the premises, which condition was a result of changes made during the plaintiff's absence." A nod of the foreman's head under the circumstances would be wholly inadequate as a peremptory order that the plaintiff should proceed to climb the column against his protest that it was dangerous to do so with the braces removed. And evidence that plaintiff so interpreted the nod would be incompetent upon such an issue, but as an indication that they were ready to have the column attached to the I beam, such evidence might be competent.

The issue of negligence stated in the petition and tried by the parties seems to be as the plaintiff states: "That the defendant, acting through its foreman, failed to notify the plaintiff of the removal of the braces after he returned from the street, and the further fact that the foreman permitted and allowed the plaintiff to climb up the iron column without warning or advising him of the removal of

the props, and of the dangerous and unsafe condition of the premises."

The petition was long, and contains several allegations that the defendant negligently did various things, without alleging any fact that would amount to actionable negligence except in the one particular before stated, and the court in its instructions recited to the jury substantially all of the allegations of the petition. The court gave a very suitable instruction for the plaintiff upon the issue of negligence presented by the petition, and then also gave numerous instructions tending to confuse the issues presented. In one instruction the jury were told: "The plaintiff claims that defendant's foreman ordered him to connect the second beam to the column which fell, and that such order was conveyed to the plaintiff by the defendant's foreman moving or nodding his head, and the movement of said foreman's eyes from the plaintiff to said column, and that thereupon plaintiff, understanding that he was ordered to ascend said column, proceeded to do so in compliance with such order from the foreman; this is denied by defendant; and it is for you to determine, taking into consideration all of the facts and circumstances of the case as shown by the evidence, whether or not such order was given. In this behalf you are instructed that, in giving an order or direction by a foreman to a servant working under his supervision, it is not absolutely necessary that such order or direction be given by word of mouth or word spoken, but the same may be conveyed by gesture, sign, or signal, such as a significant movement or nod of the head and movement of the eyes by the person wishing to convey to such workman such order or command. It is sufficient if the person so making such gesture of the head and eyes meant to convey to the workman the order to do the act in question, and the workman, so understanding it, undertook to comply with such order."

This instruction was clearly erroneous. In connection with the statement of the case as alleged in the petition, it conveyed to the jury the idea that they might find for the

plaintiff upon the negligence of this nod of the head alone. Whereas that evidence was of no importance, unless the defendant had, in the plaintiff's absence, made the conditions such that it was unusually dangerous to attempt to connect the I beam with the column, and the plaintiff was not aware of such change in conditions and could not have observed it by exercising reasonable care and caution. It is not clearly shown why the plaintiff did not observe that these braces had been removed. They are described as timbers or planks, and must have been very prominent, extending, as they did, from the I beam, eight feet or more from the floor, to a considerable distance on either side, where they were firmly planted in the ground. If he did observe, or might with reasonable care have observed, that these braces had been removed, and proceeded to connect the I beam without protest on account of the increased danger, he assumed the risk of so doing, and a nod of the forman's head would in any view of the matter amount to no more than consent that plaintiff might do so; it could not be considered as a peremptory order against plaintiff's protest which might result in his discharge if he failed to obey.

The court erred, also, in reciting the whole petition to the jury. If the evidence of the removal of the braces and of due care and caution on the part of the plaintiff had been sufficient, the court should have submitted to the jury the question of assumption of risk.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

HAMER, J., not sitting.

FRANK OPOCENSKY, APPELLEE, V. CITY OF SOUTH OMAHA, APPELLANT.

FILED MAY 19, 1917. No. 19403.

1. **Motor Vehicles:** REGULATION OF SPEED. Since the decision in *Gillespie v. City of Lincoln*, 35 Neb. 34, the legislature has modified the law as stated in that decision by the enactment of section 3049, Rev. St. 1913. By this statute no motor vehicle is allowed to be operated at a greater speed than 12 miles an hours in any city or village, or at any dangerous rate of speed when not "answering emergency calls."
2. **Municipal Corporations:** OPERATION OF MOTOR VEHICLES: LIABILITY. When a motor vehicle, the property of the city, is being operated under the directions of the city authorities for the benefit of the property itself, and not in the performance of any governmental duty, the city will be liable for damages caused by the unlawful operation thereof.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

John A. Rine and *W. C. Lambert,* for appellant.

A. H. Murdock and *Ringer & Bednar, contra.*

SEDGWICK, J.

The plaintiff recovered a judgment in the district court for Douglas county against the city of South Omaha for damages caused by the collision of an automobile, owned by the defendant city and driven by one of its firemen, with the automobile in which the plaintiff was riding, and the defendant has appealed.

The defendant demurred to the amended petition, and, after verdict in the plaintiff's favor, defendant moved for judgment notwithstanding the verdict. The defendant makes five assignments of error, but they all are predicated upon the contention that the facts alleged in the amended petition are not sufficient to entitle the plaintiff to any verdict and judgment against the defendant city. The contention of the defendant is that, as the automobile

was for the exclusive use of the fire department of the city and was being driven by one of the members of the fire department, it must be held that the city was engaged in the exercise of a governmental function, and is therefore not liable.

Omitting the formal parts, the allegations of the petition that show the character of the question presented are: That the city of South Omaha at the time set forth in the petition was a municipal corporation, having less than 40,000 and more than 25,000 inhabitants; that Twentieth street between G street and Missouri avenue in said defendant city is a street within the corporate limits thereof which has for many years been opened, improved and placed in a condition for public use; that it is in the midst of a thickly settled part of the city and is a much traveled and used street; that at the time of the accident the plaintiff was traveling west on the north side of I street; that as they reached the intersection of said Twentieth and I streets, and "while they were traveling in an ordinarily careful, prudent and lawful manner, and the driver of said machine in which this plaintiff was riding having the same under full control, they were run into by the automobile herein described as belonging to the defendant city of South Omaha and then in use by the said city; that the said machine hereinbefore described was then being driven southwardly in the center of Twentieth street by one Kilker, an employee of said defendant city as an ordinary fireman in the fire department thereof, to whom the duty of driving said machine had been previously assigned by the chief of the fire department, and who was therein operating the said machine under the direction of and by the authority of the chief of the said fire department, said Kilker having been authorized and directed by the said chief to proceed with said machine to Twentieth street and thoroughly test it out;" that the defendant's automobile was then "being driven by the said Kilker at an exceedingly high and dangerous and unlawful rate of speed, to wit, fifty miles per hour, and that, at the time it was so

being driven by the said employee of the defendant city, it was not answering an emergency call made by any one to either the police, fire department, or city ambulance, but was so being unlawfully run in the manner aforesaid, under and by the direction of the said city official hereinbefore described; * * * and by reason of the further fact that the said machine was being driven on the wrong part of the street, to wit, the center of the street, the said Haney (the driver) was wholly unable to avoid being run into by the said approaching machine; that said machine in which plaintiff was riding was struck and overturned by the said automobile owned by the defendant city and being driven by the said Kilker, and by the force thereof this plaintiff was thrown out and under said machine as it struck the ground, and that by reason thereof he sustained great and lasting and permanent injuries."

The defendant relies largely upon *Gillespie v. City of Lincoln,* 35 Neb. 34, in which it was held: "A city is not liable at common law for the negligent acts of the members of its fire department." The court stated the question to be determined as follows: "Counsel says in his brief: 'The exercising of the team was a proper thing to do. It lies in the way of a proper discharge of the functions of the department. It was not *ultra vires.* The way in which it was performed is what we complain of.' Taking it for granted, then, that the driving of the team at the time in question was a proper exercise of the functions of the fire department of the city, and within the line of duty of the driver, we will proceed to examine some of the authorities bearing upon the question involved." The court then quoted from many of the earlier cases, mostly dealing with accidents happening while the firemen were engaged in controlling fires or preparing upon emergency to do so, and said that the city was not liable.

Conditions have greatly changed in the use of the streets of cities in Nebraska since the decision of *Gillespie v. City of Lincoln,* in 1892, particularly in the use of automobiles and other dangerous motor vehicles, and the legislature

has modified the law announced in that case, as found in section 3049, Rev. St. 1913: "Within any city or village no motor vehicle shall be operated at a speed greater than twelve miles an hour or at a rate of speed greater than is reasonable and proper, having regard of the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person. * * * Provided, the speed limits in this section shall not apply to physicians, or surgeons, or police, or fire vehicles, or ambulances when answering emergency calls demanding excessive speed."

The driver of this automobile was not "answering calls demanding excessive speed." He was therefore violating the law. He was not performing any service enjoined upon him by the state, but was acting under the authority of the city, testing an article of the city property. Under modern conditions, such conduct is dangerous, and, as it is wholly unnecessary, is forbidden by express statute.

The petition states a cause of action, and the judgment of the district court is

AFFIRMED.

ROSE and CORNISH, JJ., dissent.

CHARLOTTE HANSEN, APPELLANT, v. WILLIAM H. MALLETT, APPELLEE.

FILED MAY 19, 1917. No. 19121.

Trial: MISCONDUCT OF ATTORNEY. Aggravated misconduct of counsel in stating to the jury prejudicial facts outside of the record and in urging a disregard of the law applicable to the issues and proofs may require the reversal of a judgment on a verdict in his client's favor, though he was reprimanded by the trial court, and though the jury were directed to base their findings on the evidence and the instructions.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed.*

H. E. Burkett, for appellant.

R. J. Millard, contra.

HAMER, J.

This is a bastardy case. There was a verdict in favor of the defendant, and plaintiff has appealed.

The plaintiff was the servant girl working for the defendant at his home. She began to work for him on or about September 22, 1913. She appears to have worked continuously until about Christmas, except one week in the latter part of October or the early part of November. On July 14, 1914, she gave birth to a child. At the time of the trial it was still alive. The claim is made that the plaintiff got in the family way on Friday night, about the middle of October, 1913. At that time the defendant's wife was away. She came back the next day. In November the defendant's wife appears to have been absent at Sioux City for the period of two weeks. It is claimed by the plaintiff that the defendant had intercourse with her during that time.

We do not care to discuss the details of the evidence. The view that we take of the matter is that there will have to be a new trial because of misconduct of counsel during the trial. Immediately after the plaintiff's father learned of his daughter's condition, the defendant went to the home of the plaintiff's father and there had a conversation with the plaintiff's father and mother. In this conversation he appears to have said, according to the evidence, that he was awfully sorry, and wanted to know if he could do anything for the plaintiff's father. He talked to the girl, and according to the testimony said: "Don't cry, Charlotte." The girl made accusations against the defendant in the presence of her father and mother, and recited something of what she claimed the defendant had told her about laying the blame on some boy. The defendant claimed that he was not the father of the child. There was an effort to lay the blame on the plaintiff's cousin, a boy 15 years old. There was also an effort to show that

another boy 16 years old had had sexual intercourse with the girl. There was an objection, and the testimony was excluded. The defendant's counsel in his argument to the jury said: "And you gentlemen of the jury are not going to believe that this red-haired defendant is the father of Charlotte Hansen's black-haired, black-eyed babe; and you know that when she swore that this red-haired defendant was the father of her black-haired babe she swore to a lie." Plaintiff's counsel objected to this, and the objection was sustained; but defendant's counsel proceeded: "Your verdict in this case will be either 'guilty' or 'not guilty.' While, strictly speaking, this is not a criminal case, it is, however, a quasi-criminal case, and the plaintiff must have more and better evidence than is required in a civil case." There appears to have been an objection to this, and the trial judge said: "The court will instruct the jury as to the law." Counsel for the defendant also said to the jury: "If I were a juror in a case like this, it would require more than a preponderance of the evidence. The evidence would have to be convincing beyond a doubt." Here there was an objection upon the part of plaintiff's counsel, but the court does not appear to have censured counsel for the defendant, and we are unable to find any instructions of the court to the jury telling the jury to disregard these remarks. Counsel for the defendant also said: "It is true that we did not prove that the plaintiff had sexual intercourse with other men, as I said we would in my opening statement; but I am here to tell you that this defendant is not the father of her child, and that some other man is." There was an objection to this, and the court sustained the objection; but he does not appear to have admonished counsel concerning the vehemence of his language. Counsel for the defendant does not seem to have retracted anything that he said. The address of counsel contained inflammatory statements having no foundation in the evidence, and he advocated a course at variance with law. This misconduct is assigned as error.

In *Birmingham Railway, Light & Power Co. v. Drennen,* 175 Ala. 338, Ann. Cas. 1914C, p. 1037, the court held: "Where, in argument, the plaintiff's counsel makes statements that are prejudicially erroneous, and the court, although sustaining the defendant's objection to the statements, does not exclude them or reprimand the counsel for using them, and the counsel does not retract the statements after the objection is sustained the trial court should grant a new trial."

In that case the bill of exceptions contained the following recitals: "Mr. Harsh, in making the closing argument for the plaintiff in the case, said to the jury: 'I know Hugh Morrow, and I know what I am going to tell you about him is true. I know that if he was on the jury trying this case that he would render a verdict in favor of the plaintiff in a large amount.' The defendant, by its attorney, * * * objected to the foregoing argument of plaintiff's counsel, and the court sustained the objection. At the time of making the objection, defendant's attorney stated to the court, in the presence of the jury, that the facts stated by Mr. Harsh were not in evidence, and were not true in substance and in fact."

The supreme court said: "This was clearly and wholly illegitimate argument. It was matter stated as a fact to the jury, of which there was no evidence, and of which fact evidence would not have been admissible, if offered. Its only tendency and effect was to prejudice the jury against the defense of the defendant, and against the sincerity of its counsel in so defending. Its natural tendency was to persuade the jury to render a verdict for plaintiff, because it was practically confessed by the attorney for defendant. It would be difficult to conceive of argument more objectionable, unfair, and prejudicial than was this, coming, as it did, in the closing argument, to which the defendant's counsel has no opportunity to reply. Courts should not allow verdicts obtained by such argument to stand. * * * This court on appeal, can only review the actions and rulings of the trial courts, and not those of

counsel; hence on the main appeal we cannot review the action of the trial court as to this matter, for the reason that his ruling, as far as invoked on the main trial, was in favor of appellant, and appellant cannot therefore assign it as error"—citing *Cutcliff v. Birmingham Railway, Light & Power Co.*, 148 Ala. 108, and other cases. The court further said: "But the defendant could and did assign, as ground for new trial, this illegitimate argument of plaintiff's counsel, which argument counsel failed to withdraw, or to attempt to correct the erroneous impression it may have produced upon the minds of the jury, and the trial court declined to set aside the verdict on this account; so, as to the new trial, he may assign such action as error. This court has repeatedly and in strong language condemned remarks of counsel less offensive and less offending than those used in this case, and has awarded new trials where the trial court failed or refused to take prompt and decisive action to eradicate such erroneous impressions, and has done this in cases even where counsel making such argument had done all he could to cure his error; that is, by retracting the offensive remarks."

The court held that it was error to refuse to grant the motion for a new trial. Subsequently the rehearing was denied February 17, 1912. This, therefore, is a recent case.

In *Wolffe v. Minnis*, 74 Ala. 386, the court said: "It is one of the highest judicial functions to see the law impartially administered, and to prevent, as far as possible all improper, extraneous influences from finding their way into the jury box." In that case, when the objection was made, counsel said, "Oh, well, I'll take it back;" but the reviewing court said, "Such remark cannot efface the impression. The court should have instructed the jury, in clear terms, that such remarks were not legitimate argument, and that they should not consider anything, thus said, in their deliberations."

In *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, this court said, on the rehearing, as stated in the syllabus:

"But where the misconduct of counsel is so flagrant and of such a character that neither a complete retraction nor any admonition or rebuke from the court can entirely destroy its sinister influence, a new trial should be awarded regardless of the want of an objection and exception." In that case Judge Sullivan, delivering the opinion of the court, cited *Florence Cotton & Iron Co. v. Field,* 104 Ala. 471; *Bullard v. Boston & M. R. Co.,* 64 N. H. 27; *Rudolph v. Landwerlen,* 92 Ind. 34; *Tucker v. Henniker,* 41 N. H. 317; and also two Nebraska cases.

In *Hughes v. City of Detroit,* 161 Mich. 283, the court said that the argument was inflammatory and prejudicial, and that it was cause for a reversal. In that case no allusion was made in the charge of the trial court to the improper argument of counsel. There had been an exception at the time the objectionable language was used. In that case counsel said: "Would you take all the money in the city of Detroit and have your sister go through with what this young woman has gone through with? * * * You have anybody crippled in the family, or where their usefulness is gone, and see how they stand the care, and wear away whatever affection there may be. * * * As my associate said, you would not take that injury for all the money that could be piled up in front of us." It was held that the language used was "inflammatory and prejudicial." The court said: "It was cause for reversal"—citing many Michigan cases.

In *Sullivan v. Chicago, R. I. & P. R. Co.,* 119 Ia. 464, it was held that, where it reasonably appears that the verdict may have been influenced by improper remarks made by an attorney, a new trial should be granted. In *Bjoraker v. Chicago, M. & St. P. R. Co.,* 103 Minn. 400, it was held that, where the language used by the attorney in his address to the jury is not a fair comment on the evidence or anything remotely deducible from the evidence, an order of the trial court denying a motion for a rehearing will be reversed and a new trial granted.

In *Hall v. Wolff*, 61 Ia. 559, the objectionable language was: "Hall was not the party really interested in said case; that the real animus of the case was the desire of T. H. Read, president of the First National Bank, of Shenandoah, Iowa, to cripple and injure the intervener; that Mr. Bogart, to the great relief of the citizens of Shenandoah, had started a second bank there, and that Read was managing this case in the hope of destroying or injuring said bank; that Hall 'was only a cat's paw to lend the cloak of respectability to the case,' and that he had not retained the counsel who appeared for him, but that was furnished by Read's and other banks; that this was a test case, upon which depended all the other cases pending against Wolff, in which creditors were seeking to subject property held by this intervener under the sale in controversy." It was held that a new trial should have been granted by the trial court, and the judgment was reversed.

In *State v. Duncan*, 86 S. Car. 370, Ann. Cas. 1912A, p. 1016, it was said: "Within the four corners of the evidence, great latitude in argument is allowed. But it is the duty of the court, of its own motion, to check any departure from the record. And when abuse of the privilege of argument is allowed, against objection, to such an extent that it appears probable that the verdict was thereby affected, a new trial will be granted. The law guarantees every litigant a fair and impartial trial, and this has not been secured, where the verdict has been influenced by considerations outside of the evidence."

The misconduct of which complaint is made was clearly prejudicial, and prevented plaintiff from having a fair trial. For this reason, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

SEDGWICK, J., dissents.

ROBERT S. KING, APPELLANT, V. W. W. DAY, APPELLEE.

FILED MAY 19, 1917. No. 19006.

Trial: VERDICT: CONFORMITY. Evidence examined, and *held* that the verdict does not respond to the evidence or the law as given in the court's instructions.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

Burkett, Wilson & Brown, for appellant.

Strode & Beghtol, contra.

CORNISH, J.

Under a contract entered into January 17, 1913, plaintiff purchased of defendant all the stock in the State Oil Company, agreeing to pay therefor $18,500, the business being transferred to plaintiff on the afternoon of January 29, 1913. By the terms of the sale defendant guaranteed that the value of the goods, wares and merchandise was $6,797.37; that the company owned 1,650 steel barrels; that the bills payable did not exceed $21,950.75, defendant agreeing to pay all bills in excess thereof; that the accounts receivable amounted to $12,288.24 and would be paid within three months. The value of the good will was fixed at $2,500. Alleging that defendant, "for the purpose of inducing the plaintiff to make said purchase and to enter into said contract, falsely and fraudulently and for the purpose of deceiving the plaintiff" misrepresented the net value of the assets, plaintiff brought this action to recover $17,943.60, it being alleged that the company was insolvent at the time plaintiff purchased the stock. There was a verdict for plaintiff for $1,941.90, and from the judgment thereon plaintiff appeals.

The controlling question on appeal is plaintiff's contention that his motion for a new trial should have been sustained, the proof conclusively showing that the verdict

should have been returned for a greater sum than $1,941.90, to wit, $15,486.28.

On appeal plaintiff classifies his elements of recovery as follows: for unpaid accounts receivable, $4,732.96; for excess accounts payable, not listed by defendant, $4,409.10; for shortage in inventory, $950.05; for goods on consignment, $1,194.44; for shortage in barrels, $1,698.73; and for good will $2,500.

Without considering these claims in detail, it is apparent that the verdict is not in harmony with the evidence. In the list of accounts receivable, items aggregating about $600 were listed twice by defendant. In the list of accounts payable, there was a mistake of $767.25, a debt of $775 being listed as $7.75. Taxes not listed by defendant amounted to $139.17. The largest claim under the classification of excess accounts payable relates to two cars of gasoline and one car of oil from the Chanute Refining Company, which, with freight charges and inspection fees, amounted to $2,544.86. There is considerable testimony about three cars on the switch track at the State Oil Company at the time the inventory was taken, January 29, 1913, and it seems to be proved that these cars were not inventoried. The three cars for which plaintiff is seeking to recover are cars unloaded while defendant was in charge of the company. The car of oil was shipped under an invoice dated January 10, 1913, for $324.16; one car of gas under an invoice dated January 3, 1913, for $910.13; the other car under an invoice dated January 13, 1913, for $100.83. The first two cars were paid for by plaintiff February 10, and the third car February 13. The records of the railroad company show that these cars were unloaded January 9, 18, and 20—some time before plaintiff and defendant took the inventory of the merchandise on hand. Defendant contends, however, that plaintiff has not shown that these cars were not included in the accounts payable, listed by defendant. The books kept by the State Oil Company while defendant was in charge show that the amounts due for these three

cars were not listed by him in the accounts payable. The first item which he listed under the account of the Chanute Refining Company was for oil and gas purchased December 16 and 18, $1,251.80. Other records of the company show that this was for a car of oil, $300.05, purchased December 16, and $951.75 for a car of gasoline purchased December 18. The second item listed by defendant was a note dated January 6, 1913, and due February 6, $2,748.32. It is shown by other records of the company that this note covered oil and gas purchased from December 2 to 10. The third item listed was a note due January 27, 1913, for $3,000, but other records show that this note was given for oil and gas purchased in November.

A consideration of the other items claimed by plaintiff is unnecessary to show that the verdict is not in harmony with the conceded facts or facts which are conclusively proved. Making proper allowance for additional credits to which defendant was entitled, the verdict is less than half the amount shown to be due plaintiff on the claims considered above.

The petition contains allegations pertinent to an action for breach of warranty and to an action for deceit. Defendant's motion to require plaintiff to separately state and number his causes of action was not sustained. At the close of plaintiff's testimony defendant's motion to require plaintiff to elect upon which cause of action he would rely was also overruled. The jury were given instructions applicable to both theories of recovery. The commingling of the two causes of action, together with the lack of order in presenting evidence on the different claims presented, no doubt was confusing to the jury, and has made it difficult to review the evidence on appeal. In any event, the verdict does not respond to the instructions and evidence. The trial court instructed: "If the jury shall find from the evidence that the plaintiff is entitled to recover against the defendant, you are instructed that the measure of damages on the amount the plaintiff is entitled to recover is the amount of loss that the plain-

tiff has suffered in the depreciation of the value of the stock he purchased by reason of the failure of any of the representations or guarantees of the defendant; and the jury are instructed that to determine this amount you will determine the diminution of the assets due to the defendant's failure to make his representations and warranties good."

On the second trial plaintiff should separately state and number his causes of action, and should be required to elect which cause of action he will present to the jury. In making the proof, and in the cross-examination as well, so far as possible a definite order of procedure should be adhered to, in order that the jury may not be unduly confused in considering the various items presented. With these suggestions in mind, a jury on a second trial will probably arrive at a verdict responding to the evidence and the law.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

HAMER, J., dissents.

LYDIA J. CRISWELL ET AL., APPELLEES, v. JOHN M. CRISWELL ET AL., APPELLANTS.

FILED MAY 19, 1917. No. 19142.

1. **Remainders:** ADVERSE POSSESSION. The possession of land by one who holds under a void administrator's deed, the land being sold to pay debts of the estate, will be construed to be hostile and adverse to a remainderman, so as to commence the running of the statute barring action for the recovery of the title or possession of the land, from the time that he knows that the possessor claims the entire estate in his own right, or from the time when, in the exercise of reasonable care for his own rights, he should have known that the land was so held by the one in possession.

2. **Life Estates: LIFE TENANTS: ADVERSE POSSESSION.** "The possession of land by a life tenant will not be construed to be hostile and adverse to a remainderman unless the knowledge is clearly brought home to the latter that the life tenant claims the entire estate in his own right, adverse and hostile to any claim or interest in the land by the remainderman or others claiming under him." *Maurer v. Reifschneider*, 89 Neb. 673.

3. **Overruled Cases.** *Hobson v. Huxtable*, 79 Neb. 334, *McFarland v. Flack*, 87 Neb. 452, *Helming v. Forrester*, 87 Neb. 438, and *Bohrer v. Davis*, 94 Neb. 367, in so far as they are in conflict with the rule as herein stated, are overruled.

4. **Evidence: PRESUMPTIONS: ADMINISTRATOR'S SALE: CONSENT OF MINORS.** On the trial of the case, a transcript of the proceedings in the district court, leading up to the administrator's sale and confirmation thereof, was introduced without objection, which showed written consent upon the part of certain of the remaindermen, then minors, to the sale. The original document was not introduced. *Held*, that this constituted presumptive evidence that the consent purporting to be signed by them was a genuine instrument.

5. **Infants: ESTOPPEL: ADMINISTRATOR'S SALE.** Upon becoming of age, it became the duty of such remainderman to affirm or disaffirm the sale. Failure to disaffirm such sale within a reasonable time after maturity would constitute an estoppel against them from disputing the title of the purchaser at the sale.

APPEAL from the district court for Knox county: ANSON A. WELCH, JUDGE. *Reversed.*

McGilton, Gaines & Smith and *W. A. Meserve*, for appellants.

M. F. Harrington, contra.

CORNISH, J.

Over 30 years ago, Andrew Hammond died, leaving a wife and 14 children.

In May, 1887, one Stolp, who succeeded Andrew P. Hammond as administrator, for the purpose of paying debts of the estate, obtained leave and sold the south half of the southeast quarter of section 34, of the estate, to one M. G. Owens, for the sum of $885, its fair value, giving his deed, purporting to convey the title, which was confirmed in the district court December 8, 1887. From that day to this

Owens and his successors, through mesne conveyances, have been in open, notorious, exclusive and adverse possession of the land, claiming to own the same in fee. It is agreed that M. G. Owens, purchaser, was a stranger to the title, did not enter by virtue of the widow's life tenancy, and that the deed to him, though color of title, was void because the land was part of the homestead. This is true unless certain heirs are estopped to claim title—a matter not necessary to the present discussion, but which will be considered later.

This action is brought by some of the heirs to recover possession of and by others to quiet title to the land, and for rents and profits. The widow, owner of the life estate, died February 25, 1901. This action was commenced February 14, 1911, lacking eleven days of being ten years after her death. The defendant's adverse possession, as above stated, goes back to December 8, 1887. Three of the children had not been of age ten years when the action was commenced. It is agreed as to them that the statute of limitations has not run. As to the other heirs, more than ten years having elapsed since they became of age, it is contended by defendant that their action is barred by the ten-year limitation of the statute. It is contended by the plaintiffs that their action to recover possession is not barred until ten years after the death of the life tenant, their mother. This constitutes the main controversy which we have to determine.

We must first consider the law as heretofore decided by this court. The general rule is that the remainderman has ten years in which to commence an action to recover possession after the death of the life tenant, and cannot commence the action before such death. In the meantime the remainderman is not without a complete remedy against one claiming adversely. It is expressly provided by statute that he may at any time avail himself of the action to quiet title, procuring a decree which will determine his right to possession at such time as he may be entitled to it.

Presumably, the person in possession is the life tenant, or one in privity with the life tenant, and generally such person's possession will not be adverse to the remainderman. Hence, no cause will arise in such cases until the death of the life tenant. Here, the rule supposes an uninterrupted continuation of the relation of life tenant and remainderman. When, as in this case, possession is in a stranger to the title, who has acquired an independent title, or color of title, adverse to the remainderman and life tenant, the question bears a different aspect.

It is important to consider some of our decisions.

Hall v. Hooper, 47 Neb. 111, was an action brought by the remainderman to quiet title, while the life tenant was yet living, against one in possession under a void deed like the one in controversy. The court said the action was the proper one, but held that, inasmuch as the defendant's possession had been adverse for more than 10 years since plaintiff arrived at maturity, the action was barred and title quieted forever in the defendant.

Lyons v. Carr, 77 Neb. 883, is like the case in hand—void administrator's sale and deed to pay debts of the estate. The widow, life tenant, and surviving children bring action to quiet title. Held, that the statute commenced to run from the time of the sale, and the court quiets title forever in the purchaser, as against the widow and remainderman. *Hall v. Hooper, supra,* is cited.

Hobson v. Huxtable, 79 Neb. 334, on rehearing 340, was an action to quiet title by two remaindermen against the adverse possessor under void deed. The life tenant died pending suit. Two other remaindermen filed cross-petitions in ejectment. The court sustained their action, although an action on their part to quiet title would have been barred by the running of the statute since their maturity.

In *Holmes v. Mason,* 80 Neb. 448, plaintiff was purchaser and adverse holder under a void deed at administrator's sale to pay debts. An action was brought to quiet title while the life tenant was still living. The court held

that the statute began to run when the remaindermen reached their majority, and, ten years having elapsed, title was quieted in the plaintiff.

In the case in hand, three of the plaintiffs, not of age ten years when the action was commenced, ask to have title quieted in them. The others, admitting that such action is barred as to them, ask a recovery of the land. As they say in their brief: "What we are after in this case is the right to raise oats, wheat, corn, alfalfa, and other products upon this land." They do not care where the title is.

This view, if correct, presents a surprising state of the law. Logically, it assumes that ownership may be in one and use forever in another. It lets the determination of the question, who shall have the shell and who the kernel of the nut, depend on accident. It makes out of remedial forms causes of action. It will lead to absurd and unjust results. In the case in hand, when the life tenant died, one-half of the remaindermen were more than ten years past maturity. If this view is sound, then we must say to the defendant: "Everything depends on the time and manner that the facts of a case happen to come before us. As it is, we must give to the plaintiffs the order in ejectment prayed. If you had been more alert and quick-witted and had commenced action to quiet title just before the life tenant died, your rights to the land would have been secure." We must say to all but three of the plaintiffs: "While we give you possession, we cannot quiet title in you. Your right is barred; but, after you get possession, then, according to our decisions, you may commence a new action against the defendants and have title quieted in you, doing indirectly what cannot be done directly." We must say to remainderman, as in *Hall v. Hooper, supra*: "If you bring your suit now, while the life tenant is living, we must defeat you because ten years have elapsed. If you will wait a year or two, until the life tenant has died, your possession will be sure." We must say to those who have had ten years' adverse pos-

session against adults: "If you bring your action now, your title is perfect. If you wait, even though you do not know that your title is questioned, until the life tenant dies, though 25 years hence, the judgment is equally certain against you." It is apparent that this ought not to be, and we think is not the law.

To make one's rights depend upon facts or events which have not the slightest connection with the merits of the controversy is both absurd and unjust. Litigants cannot be expected to know these quirks of the law. If one's right to land against the remainderman is complete today, it is absurd that the death of a third party tomorrow can defeat those rights and lose to him all the benefit of the situation which exists. The rights through court procedure of conflicting claimants to land should be mutual and equal so far as may be.

The rule is also unjust in this: Equitable conduct requires that one should make a timely assertion of his rights against another who he knows may be acting in innocence of his claim. The moral principle upon which estoppel is based applies. While, ordinarily, one has the undoubted right to bring his action within the statutory period, yet, as held in *Hawley v. Von Lanken*, 75 Neb. 597, and afterwards in *Foltz v. Maxwell*, 100 Neb. 713, courts of equity have inherent power to refuse relief, after undue and inexcusable delay, independent of the statute, when not to do so would work injustice in the particular case.

In so far as the view under discussion reflects the holding in *Hobson v. Huxtable, supra,* that case should be overruled. To quote from defendant's brief: "Either this court was wrong in *Hall v. Hooper* and *Holmes v. Mason* or in *Hobson v. Huxtable.* (Also *Lyons v. Carr, supra.*) It is to be remembered that the court decreed in *Holmes v. Mason* that the possession of Holmes, even pending the life estate outstanding, was sufficient on which to base a decree quieting the title of Holmes against the remaindermen not under disability. If we are going to adopt the proposition that there cannot be any adverse

possession as against the remainderman, pending a life estate, then *Hall v. Hooper* and *Holmes v. Mason* are both wrong. It is anomalous to assert that an adverse right of possession may run against remaindermen sufficient to enable the adverse holder to quiet his title against the claims of the remaindermen, and at the same time hold that the right of the remaindermen, so far as any possessory action is concerned, is not barred by the statute of limitations. Yet if it is true that there cannot be any adverse holding by one in possession during the life of the life tenant out of possession as against the remainderman, then certainly it should be held that the remainderman loses no rights whatsoever, either in law or in equity, by such possession. If the possession may be adverse to remainderman during the life of the life tenant as decided in *Hall v. Hooper* and in *Holmes v. Mason,* then correlatively the same adverse possession that would bar the remainderman's right to quiet his title should give the adverse holder the right to maintain and obtain a decree quieting title against him. It is unreasonable to assert that while the statute has run against the action to quiet title, by reason of adverse possession, yet the possessory right remains intact. Under the *Huxtable* case the court could put the barred remainderman into possession, and then, having put him there, could, under the doctrine laid down in *Batty v. City of Hastings,* 63 Neb. 26, and *Dringman v. Keith,* 86 Neb. 476, quiet the title, and so do by indirection what the court has in all cases asserted might not be done."

Section 6266, Rev. St. 1913, provides: "An action may be brought * * * by any person or persons, whether in actual possession or not, claiming title to real estate against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title."

Section 6268 provides: "Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this article."

As to half the remaindermen in this action, more than ten years had elapsed since their arriving at maturity and the death of their mother, the life tenant. If either they or the defendant had commenced action just before the mother died, this court, following its decisions (there is not one to the contrary), would have quieted title in the defendant. It seems that the above quoted statutes make such decisions necessary. Such decisions, too, would have been made upon the ground that, ten years having elapsed, the defendants' adverse possession had ripened into title. Statutes of limitations as to land bar rights, not remedies. This court has distinctly held that in substance. In *Postal v. Martin,* 4 Neb. (Unof.) 534, we held: "Adverse possession of lands for the period of limitations operates of itself as a grant of all adverse titles and interests to the occupant." The facts existing, title vests by statute. *Gatling v. Lane,* 17 Neb. 77. How can it be said that these plaintiffs still have their remedy in ejectment when their title had gone, and consequently their right to possession? To so hold is equivalent to reversing several of our decisions as to the nature of the bar of the statute as applied to land.

In *Foree v. Stubbs,* 41 Neb. 271, we held: "The purpose of the act of 1873, entitled 'An act to quiet title to real estate' (secs. 57, 58, 59, ch. 73, Comp. St.), was to abolish the fiction of constructive possession and prevent a multiplicity of suits, by a determination in one action of the rights of all persons asserting title to real estate." From the time of the passage of that remedial statute, with or without a statute of limitations, it became incumbent upon all persons claiming an interest or title in land to make a timely assertion of their claim. *Hawley v. Von Lanken,* and *Foltz v. Maxwell, supra.*

This seems to be the holding in other jurisdictions. In *Murray v. Quigley,* 119 Ia. 6, 14, 97 Am. St. Rep. 276, the court, in discussing this statute, says that there can be no hardship in such a rule, and adds: "And more especially

is this true where the possession is or may be held under a title entirely independent of and hostile to the life tenant." In *Crawford v. Meis,* 123 Ia. 610, 618, 101 Am. St. Rep. 337, the court, commenting upon this rule, states that it "involves no hardship, and the beneficent effect thereof must be to bring up for settlement disputed questions of title before becoming stale, and while yet the facts are within reach of the parties interested." See, also, 1 R. C. L. 743.

This court has held that, as between cotenants, where the acts of one unequivocally show adverse possession, or conduct amounting to an ouster, the statute of limitations commences to run as against the other cotenant.

As between life tenants and remaindermen, we have held that the statute commences to run in favor of the life tenant whenever knowledge is clearly brought home to the remainderman that the life tenant claims the entire estate. *Maurer v. Reifschneider,* 89 Neb. 673. When the statute should begin to run depends somewhat on the character of the possession. When, as in this case, the person in possession, purchased at administrator's sale, is a stranger to the title, and did not acquire any estate, possessory right or claim through the life tenant, the remaindermen are much more likely to know the situation than if it were adverse possession by a life tenant, and less likely to be deceived as to the character of the possession that is claimed. As against the remaindermen, it would seem equitable that the adverse holding should commence the running of the statute whenever they have actual knowledge of such possession, or whenever, in the exercise of reasonable care and prudence, they should have acquired such knowledge.

In the case before us, the heirs must have known of the adverse holding by defendant at all times. While the evidence is not clear and specific on this point, the fact remains that the remaindermen lived across the street from the land in controversy while the defendants lived thereon. It will also be recalled that in 1886 the widow petitioned for the sale of the land to pay the debts of the estate. Of

course, the statute would not commence to run until the children had arrived at their majority.

The argument has another phase which deserves our attention. The statute applicable (Rev. St. 1913, sec. 7564) reads as follows: "An action for the recovery of the title or possession of lands, tenements or hereditaments, * * * can only be brought within ten years after the *cause of action* shall have accrued." Sometimes statutes relate to remedy. This calls on us to determine what is the cause of action, for the reason that, if an action to quiet title and one to recover possession are two remedies for one cause of action, then the statute would be conclusive in this case.

Bliss, Code Pleading (3d ed.) sec. 1, defines a civil action, and then says: "As the action is a judicial proceeding for the redress or prevention of a wrong, the cause of action must necessarily be the *wrong which is committed or threatened,* and the object of a specific action is such redress or prevention by means of the relief which is sought." The cause of action must be some wrong committed or threatened touching one's rightful claim to the land. As to the remainderman, his cause of action in an action to quiet title against one in possession, claiming title adversely, and his action to recover possession are identical. In both cases his cause of action is the adverse claimant's possession, coupled with a wrongful claim of ownership. It is the wrongful refusal to recognize the plaintiff's rights in the land. On this principle that "the identity of the cause of action is preserved," this court has permitted actions to recover possession to be converted into actions in equity, and, conversely, actions to quiet title to be converted into ejectment actions, and has held that the commencement of either stops the running of the statute. The forms of action go to the remedy, not to the cause. *Gregory v. Lancaster County Bank,* 16 Neb. 411; *McKeighan v. Hopkins,* 19 Neb. 33; *Homan v. Hellman,* 35 Neb. 414; *Scroggin v. Johnston,* 45 Neb. 714; *Butler v. Smith,* 84 Neb. 78.

This view is consistent with this court's holdings, above mentioned, that statutes of limitations bar rights. *Postal v. Martin,* and *Gatling v. Lane, supra.* To hold, as we always have, that the *quia timet* action begins running with adverse possession, and also hold that afterwards, by reason of a death, a new statute allowing another remedy involving title commences running, is in defiance of those decisions and of logic.

We have found only four cases decided that are like the instant case, where the adverse holder was a stranger holding by independent title, not in privity with the life tenant. Three of these, including the latest, are in conformity with this opinion, the *Huxtable* case being the exception.

Other cases have been decided where the contest was between the remainderman and the life tenant or one in privity with the life tenant. The presumption of fact is that the possession of the life tenant, or one holding under or through the life tenant, is lawful and not adverse. Remaindermen have the right to act on that presumption, and not be charged with the duty of keeping their estate under constant observation. We held in *Maurer v. Reifschneider, supra,* that the statute would not begin to run in such cases until knowledge of the adverse holder's claim to the entire estate had been brought home to the remainderman. In these cases there is a conflict in the decisions. No one has denied the right of the adverse possessor to his *quia timet* action against remainderman or remainderman's right to the same action against the adverse possessor; but, where no such action has been brought during the life of the life tenant, it has been held that the remainderman should be permitted to commence action to recover possession within ten years of the death of the life tenant; this upon the ground that the remedy by ejectment is not available until then. These decisions, in so far as they stop the running of the statute once begun, or defeat the title already acquired by adverse possession, should be overruled.

In *First Nat. Bank v. Pilger,* 78 Neb. 168, the plaintiff, who held under deed from the widow who had been awarded the homestead under the Baker decedent law, brought *quia timet* action against the heirs some months after the widow, life tenant, died. Ten years had elapsed since the widow's deed. The court quieted title in the plaintiff on grounds of adverse possession for ten years.

In *Helming v. Forrester,* 87 Neb. 438, a case like the last above mentioned, the cause was tried in equity, but recovery of possession asked for was had. Although ten years had elapsed since the widow's deed, it was held that the suit having been commenced within ten years from the time of the death of the life tenant, the statute had not run. Whether the heirs had any notice of the adverse possession during the lifetime of the life tenant does not appear.

In *McFarland v. Flack,* 87 Neb. 452, the remainderman began action to recover possession against another holding under a deed by the life tenant. More than ten years had elapsed since the adverse possession had begun, but not ten years since the death of the life tenant. The case was decided in favor of the remainderman. The opinion shows that there was no notice to the remainderman of the adverse possession during the life estate, except recording of the deed. In so far as this case could be construed to hold that the death of the life tenant would stop the running of the statute, already commenced, in favor of the adverse possessor, it should be overruled.

In *Maurer v. Reifschneider,* 89 Neb. 673, the remainderman brought *quia timet* action against the husband of the ancestor's widow, who had conveyed to him. This is the action mentioned above, wherein it was held that the statute begins to run when knowledge is clearly brought home to the remainderman that the life tenant claims the estate. See, also, *Larson v. Anderson,* 74 Neb. 361, to the same effect.

In *Bohrer v. Davis,* 94 Neb. 367, action to recover possession was brought against one holding by deed from the

widow who had taken the homestead under the Baker decedent law. More than ten years had elapsed since the time of the deed. Held (one judge dissenting) that the remainderman could bring action to recover possession within ten years after the death of the life tenant. This decision should be overruled in so far as it holds that the death of the life tenant may stop the running of the statute barring claim of title and allow the remainderman ten years' additional time in which to assert his title and recover possession.

The defendant contends, as we have said, that some of the plaintiffs are estopped from bringing this action for the reason that, in the proceedings in the district court for license to sell the land to pay debts, they assented to and requested the sale. The defendant's position is that when these heirs became of age it was their duty, within a reasonable time, to affirm or disaffirm this action upon their part. In our view, the defendant's contention is right. The evidence touching this point consists of the transcript from the district court showing the proceedings leading up to the administrator's sale of the real estate. It shows that such a consent was filed, signed by five of the heirs, aged from 15 to 21 years. The application for the sale of the real estate was first made by Andrew P. Hammond and the consent filed at that time. In the same action the application for license to sell was renewed by Stolp, the successor to Hammond, as administrator. This evidence raises a presumption, without other proof, that the document showing consent of the heirs was a genuine instrument. If so, it follows that upon reaching their majority it was the duty of those heirs to affirm or disaffirm their act within a reasonable time, failing to do which they would be estopped to claim title as against the purchaser. The evidence does not show that they disaffirmed, and, as to such heirs, the rule should be applied. *Foltz v. Maxwell, supra; Ward v. Laverty*, 19 Neb. 429; *O'Brien v. Gaslin*, 20 Neb. 347; *En-*

glebert v. Troxell, 40 Neb. 195; *Craig v. Van Bebber,* 100 Mo. 584, 18 Am. St. Rep. 569.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings according to law.

REVERSED.

FREMONT MILLING COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 19, 1917. No. 19526.

1. **Carriers:** TARIFF RATES: COMPLIANCE. Both the shipper and the carrier are bound to comply with the published tariff rates, rules and regulations. Erroneous statements of the carrier, or its agent, as to the same will not relieve either the shipper or the carrier from such obligation. A construction placed upon the tariff or transit rules and regulations by defendant's agent or what defendant may have done in the way of refunding unearned freight rates paid in other cases is immaterial.
2. ———: MILLING IN TRANSIT RATES. A milling in transit rate is an entirety, and must be accepted and carried out in its entirety or not at all.
3. ———: INTERSTATE SHIPMENTS: UNUSED TRANSIT CREDIT. A shipper cannot maintain an action in the courts of this state for unused transit credit on shipments of grain made from various points in Nebraska, destined to points outside of Nebraska and to one point in Nebraska, where parts of each car were forwarded indiscriminately to the points of destination, and where the rules and regulations provided for in the published tariff rates, rules and regulations giving milling in transit privileges have not been complied with.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed and dismissed.*

A. A. McLaughlin, Lyle Hubbard and *Wymer Dressler,* for appellant.

Courtright, Sidner & Lee, contra.

CORNISH, J.

During the spring and summer of 1912, the plaintiff billed in car-load lots over defendant's lines, with milling in transit privileges at Fremont, grain from various points in this state to various points, all but one outside of the state, paying freight charges from point of shipment to point of destination. A part of each shipment, or its equivalent, in accordance with milling in transit rules, was afterwards forwarded to the points of destination. The remaining portion was not, leaving the plaintiff an unused portion of its milling in transit credits. Plaintiff's action is based on this unused credit for grain never forwarded. It sues to recover the difference between what would be the local rates on the unforwarded grain in car-load lots to Fremont and the rates originally paid on this grain, or its equivalent. The defendant points out that in each case the plaintiff in its claim has segregated the unforwarded tonnage from the remainder of the shipment both in and out of Fremont; that by virtue of the milling in transit privilege plaintiff was permitted to ship the grain to Fremont, resume possession, mill at that point, and forward the produce to destination upon the through rate, which was less than the two local rates would have been. Defendant admits that plaintiff was entitled to have the product, after milling of each car, forwarded within the time and according to the rate regulations and tariff provisions governing such shipments and milling in transit privileges.

It appears that, under the regulations for such shipments, there was a time limit within which grain held in transit could be forwarded, or what is called transit credit could be used. If the grain was not tendered for shipment within the time, the right to ship or use the transit credit terminated and the credit forfeited. No such tender was made in this case.

The tariff rules and regulations governing shipments with milling in transit privileges go into great detail, and permit only the various products of the grain to be for-

warded, so that the equivalent in weight of the shrinkage and portion lost in milling, what is called invisible loss, is not permitted to be forwarded. They provide that an account shall be kept and settlement had before the time limit for forwarding, which was not done in the instant case.

The defendant contends that, inasmuch as the plaintiff has not brought itself within these tariff rules and regulations, no settlement being had or forwarding shipments tendered within the time required, it has forfeited its right to the transit credit, and cannot be refunded any freight paid. While the plaintiff agrees that tariff rates must govern, it insists that the railroad can charge for carriage only what it has earned, that it cannot ask more than the tariff rate for service actually rendered, and that no tariff rules or regulations are involved where freight is not carried.

We are of opinion that whatever equities might exist in favor of the plaintiff (we do not say whether any would exist), if its claim were being considered before a railway board of transportation, this court cannot afford it any relief.

The policy of railway legislation in recent years has been, not alone to pass laws commanding what is right and prohibiting what is wrong in the management of railroads, but to give over to the public the management itself, in so far as may be necessary to prevent the wrongs complained of, touching rates, discriminations, facilities, etc. The purpose is to have the public hand in touch with everything so that the law cannot be violated, even though both parties to the transaction wish it. Courts of law, where parties are presumed to be adverse, are not suited to that sort of work. Collusion, resulting in discrimination, was one of the main evils to be remedied.

Where the tariff rates and regulations are published, these become the law governing every party to the shipment, only to be varied from by leave of that administrative body known as the railway commission, which has

power, by general rules, equally available to all other shippers, to do what is equitable. The railroad might resist a claim like this in court, but not do so in case of a favored shipper. All shippers must be treated alike.

It follows that every shipper is bound to know just what the tariff rates, rules and regulations are, and that the parties can make no express contract in any way modifying or superseding them. It follows, too, that the rights of parties cannot be altered by estoppel, as in case of private contracts. All special arrangements between shipper and carrier are prohibited.

The transit credit in the instant case cannot be treated as if it represented a single shipment of grain to Fremont. Being made up of parts of car-load shipments to Fremont, the remaining portion of which was forwarded to points of destination, it must be treated as a part of shipments made with milling in transit privileges, under the published tariff rates, rules and regulations for interstate shipments, and, the same not having been complied with, the plaintiff is not entitled to any relief in courts of law.

The judgment of the trial court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

BROWN CONSOLIDATED MILLING COMPANY, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 19, 1917. No. 19527.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed and dismissed.*

A. A. McLaughlin, Lyle Hubbard and *Wymer Dressler,* for appellant.

Courtright, Sidner & Lee, contra.

CORNISH, J.

Except that in this case all of the points of final destination of grain shipments were outside of the state, the facts herein are substantially the same as in *Fremont Milling Co. v. Chicago & N. W. R. Co., ante,* p. 362, and this case is governed by the law as laid down in said case.

For the reasons therein given, the judgment of the trial court should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

WILLIAM DIEDRICHS, APPELLANT, V. LAURA STEPHENSON, APPELLANT; WALTER V. HOAGLAND ET AL., APPELLEES.

FILED MAY 19, 1917. No. 19226.

1. **Attorney and Client: GOOD FAITH.** It is a familiar rule of law that an attorney is required to exercise the utmost good faith in all of his relations and dealings with his client.
2. ———: ———. The evidence examined, and *held* that defendants, who are attorneys, did not violate the forgoing rule in their relations with their client, and that their conduct in the premises was without fraud.

APPEAL from the district court for Lincoln county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Burkett, Wilson & Brown and *R. H. Beatty,* for appellant.

Hoagland & Hoagland and *John J. Halligan, contra.*

DEAN, J.

The defendants Hoagland are members of the bar of this state. They reside and maintain a law office at North Platte. Plaintiff's wife employed defendants as counsel in a divorce action, and they rendered to her valuable legal services in that case, in which she prevailed in both district and supreme courts, and as well in subsequent litigation that grew out of the divorce case. In payment therefor

she conveyed to defendants a tract of land; defendants paying to her a sum of money that represented the difference in value between the land and the reasonable value of the services. Plaintiff now seeks to recover from defendants the tract of land conveyed to them by Mrs. Diedrichs on the ground of fraud, alleging ownership in the husband at the time of conveyance, a contention that is not sustained by the record. Plaintiff also demands a large sum of money claimed as damages. Mrs. Diedrichs appears in this action as Laura Stephenson.

In the divorce proceeding the plaintiff in this case was defendant. He has since remarried the wife who divorced him, and is now aided and abetted by her in his efforts to maintain this action. As soon as plaintiff and his wife were reconciled, their joint belligerence was directed against the wife's rescuer, a situation not altogether novel in human affairs. If plaintiff, who is appellant here, were to prevail, defendants would be deprived of any remuneration for services rendered, and besides would lose the sum of money paid to plaintiff's wife in part payment for the land when it was conveyed to them. In the trial court defendants prevailed, and in view of the record before us they must prevail here.

A lengthy statement of the facts is not deemed necessary, nor is it incumbent on us to write an opinion long drawn out. We believe it sufficient to say that we have carefully examined the record, and we are unable to find the defendants guilty of practicing any deceit or fraud or bad faith toward their client. We are not unmindful of the familiar rule that requires an attorney to exercise the utmost good faith in all his relations and dealings with his client. In this respect, as in all else, the record amply supports the judgment that was rendered in favor of defendants. The learned trial judge who heard the case was abundantly justified in finding on all points in favor of defendants.

The judgment is right, and is in all things

AFFIRMED.

SEDGWICK, J., concurring.

It appears to be conceded by all parties that the defendants Hoagland, as attorneys for Laura Diedrichs, acted in entirely good faith. Notwithstanding that fact, the law is so careful of the confidential relation between attorney and client that, if a client conveys property to her attorney while that relation exists, and is without information as to the value of the property at the time, the court in an action of this nature would be very careful to ascertain whether the value actually paid was the full value of the property. In this case, however, the attorneys were not attorneys for the plaintiff William Diedrichs. No relations of confidence existed between them, and Laura Diedrichs does not appear to have made any complaint in regard to the transactions with her attorneys for more than ten years after the transactions took place. It is desirable that questioned relations between attorneys and their clients should be adjusted at as early a date as is practicable, but the statute of limitations had run against all claims of Laura Diedrichs before the filing of her cross-petition in this case. The plaintiff, William Diedrichs, appears to have transferred this property to avoid the payment of his creditors. His original grantee did, at his request, convey the property to Laura Diedrichs, who was then Mr. Diedrich's wife. This does not seem to be equivalent to a reconveyance to Mr. Diedrichs himself in this case, because the motive which the law considers fraudulent that inspired Mr. Diedrichs to transfer this property still existed, and taking the title in the name of his wife might still defeat his creditors. Mr. Diedrichs, therefore, is not in a position to maintain such an action as this.

For these reasons, I consider that the judgment of the district court is correct.

LUVERNE A. WILLIAMS, APPELLEE, V. CHARLES E. WILLIAMS, APPELLANT.

FILED MAY 19, 1917. No. 19273.

1. Divorce: SERVICE OF PROCESS. Section 1571, Rev. St. 1913, is a special statute relating to a special subject. The act, as amended, construed, and *held* that under this section in an action properly brought in this state personal service of summons outside of the state is sufficient.
2. ———: SUFFICIENCY OF EVIDENCE. The testimony examined, discussed in the opinion, and *held* sufficient to sustain a decree of divorce.
3. ———: JURISDICTION. In pursuance of section 1571, Rev. St. 1913, the district court has jurisdiction to grant a divorce in a proper case in any county where the parties, or one of them, reside.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Strode & Beghtol, for appellant.

Lincoln Frost and *Guy T. Tou Velle, contra.*

DEAN, J.

This is a divorce action commenced on April 15, 1914, by Mrs. Luverne Williams, plaintiff, against her husband, Charles A. Williams, defendant, in the district court for Lancaster county. Plaintiff obtained a decree, and defendant appealed.

A summons, issued in pursuance of section 1571, Rev. St. 1913, was served on defendant in Colorado. He appeared specially, basing his objection to jurisdiction of the person "on the ground that the statute expressly requires the case in which such service is made be commenced in the county in which the cause of action arose." Defendant also contends that the manner of serving the notice in suit is found in section 7644, Rev. St. 1913, and argues that the two sections should be construed together. The special appearance was overruled to which defendant excepted.

An affidavit showing the nonresidence of defendant was filed preliminary to an effort made to obtain service by publication that was not perfected. The summons was dated April 15, 1914, and directed to the sheriff of Lancaster county, who on the same date by indorsement thereon appointed E. I. Cooke of Larimer county, Colorado, special deputy to make service and return of the writ on or before April 27, 1914. The return is under oath showing service on defendant April 17, 1914, by copy delivered to defendant in person in Larimer county, Colorado, requiring him to answer on or before May 18, 1914.

Section 1571, Rev. St. 1913, is a special statute relating only to divorce. The statute follows: "A petition or bill of divorce, alimony and maintenance may be exhibited by a wife in her own name, as well as by a husband, and in all cases the respondent may answer such petition or bill without oath. No person shall be entitled to a divorce unless the defendant shall have been personally served with process if within this state, or with personal notice duly proved and appearing of record, if out of this state, or unless the defendant shall have entered an appearance in the case; but if it shall appear to the satisfaction of the court by the affidavit of the petitioner or of his or her attorney that the petitioner does not know the address or residence of the defendant, and has not been able to ascertain either, after reasonable and due inquiry and search continued for three months after the filing of the petition, the court or judge in vacation shall authorize notice by publication of the pendency of the suit for divorce, to be given in a manner as provided in other cases under the Code of Civil Procedure."

All that part of section 1571 following the first sentence was added by amendment in 1909. The legislature seems to have divided the amendment with respect to personal service on defendants into two parts, namely: The first part relating to service on a defendant within the state; the second part to service on a defendant out of the state. The summons, its service and return were in all respects

regular, and it follows the trial court properly overruled the special appearance. The special divorce statute serves the good purpose of requiring a plaintiff to give a nonresident defendant in a divorce action whose address is known actual notice of the pendency of the suit. Rev. St. 1913, sec. 8574.

State v. Cornell, 53 Neb. 556: "It is a well-settled rule of construction that special provisions in a law relating to particular subject-matter will prevail over general provisions in other statutes so far as there is a conflict." To the same effect are the following: *Richardson County v. Miles,* 14 Neb. 311; *Albertson v. State,* 9 Neb. 429; *McCann v. McLennan,* 2 Neb. 286.

Defendant next contends that the court was without jurisdiction of the subject-matter, alleging that the cause arose out of the state, and that plaintiff did not reside within the state for two years next before bringing the suit. With respect to residence the following among other facts appear: The parties were married in 1898 in Springfield, Massachusetts, and soon after they came to Lincoln and resided until about 1905, when they removed to Colorado. Two children were born to them, a boy and a girl, now about 18 and 16, respectively. In 1909 plaintiff purchased a ten-acre tract of land within a convenient distance of Lincoln for a home, on which a substantial house was afterwards built by her as a residence for the family, being completed in 1912, and from thence being the family residence and home. After the Lincoln tract was bought, the Williams family continued their residence in Colorado until February 1, 1912, when Mrs. Williams came to Lincoln, bringing one of her minor children with her. On March 28, 1912, the remaining minor child and Alice Williams, a girl of 17, who made her home with the family, joined her at Lincoln, and plaintiff and her children resided continuously in Lincoln from that time until suit was begun, with the exception of a brief vacation period in the summer months of 1912. The testimony throughout discloses that it was plaintiff's *bona fide* intention to reside

permanently in this state, and that in pursuance of such intention she made Lancaster county her home continuously, except for a vacation period noted elsewhere, from the time of her arrival on February 1, 1912, until this suit was begun on April 15, 1914, and that she was then and for more than two years had been a resident of Lancaster county, Nebraska.

It is elementary and it is the universal rule that residence in a community is determined by the intention of the parties. *Swaney v. Hutchins,* 13 Neb. 266; *Chesney v. Francisco,* 12 Neb. 626; *People v. McClay,* 2 Neb. 7. Defendant's argument that a wife cannot have a residence separate and apart from that maintained by her husband is not supported by statute nor by the authorities. Section 1567, Rev. St. 1913, provides generally that a divorce may be decreed by the district court of the county "where the parties, or one of them, reside." *McConnell v. McConnell,* 37 Neb. 57. *Eager v. Eager,* 74 Neb. 827, holds that the district court has jurisdiction "to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside." The rule is generally recognized. In *Vence v. Vence,* 15 How. Pr. (N. Y.) 497, it is held: "The common-law maxim, that the domicile of the wife follows that of the husband, has no application in actions for a divorce, where a separation has actually taken place, and where the very proceedings in the action are to show that the relation of husband and wife should be dissolved, or so far modified as to establish separate interests, and especially of bed and board, and of domicile and home." *Jones v. Jones,* 60 Tex. 451; *Johnson v. Johnson,* 12 Bush (Ky.) 485; *Cain v. Cain,* 5 Pa. Co. Ct. Rep. 669.

When plaintiff married defendant, or very soon thereafter, she became the owner by inheritance of property of the value of about $63,000. The defendant was almost destitute of means. While they lived together in Lincoln defendant attended the state university for about three years, plaintiff in the meantime supporting the family and

maintaining the household. Sometime after defendant completed his education at the state university the parties moved to Colorado, and their marital troubles seemed to increase, notwithstanding that plaintiff purchased and presented to defendant a valuable ranch in that state.

In 1913 plaintiff begun in Colorado and prosecuted to judgment a suit against defendant for divorce. Defendant made no appearance at the trial. Afterward he attacked the judgment, and on his application supported by affidavit, in which he alleged that his wife was then a resident of Lincoln, Nebraska, the judgment was vacated and the cause held for retrial, but before it was reached Mrs. Williams dismissed the action. Defendant now argues that plaintiff should not be permitted to maintain this action because of statements made by her in her petition in the Colorado case with respect to residence. Whatever may have been the fact in that case, it appears that the defendant not only in his affidavit alleged that plaintiff was at that time a resident of Nebraska, but procured a vacation of the judgment that was followed by a dismissal. Confronted as defendant is with his affidavit in the Colorado suit, he is not now in position to change his ground and contradict his own affidavit and his plea then made that plaintiff was a resident of Lincoln, Nebraska, in 1913.

The trial occupied four days. It was not shown that defendant at any time supported his wife or his two children, though of sufficient ability to do so. He was about 42 years of age at the time of the trial, strong and vigorous in mind and body, an athlete, highly educated, and no sufficient reason appears why he could not have earned a comfortable living for his family. The testimony fairly shows that the defendant, instead of aiding to conserve the estate of his wife and endeavoring to support and maintain her and his children, was a positive factor in its dissipation. The trial court found "generally for the plaintiff and against the defendant, upon the issue of nonsupport, and found that the defendant, though being of

sufficient ability to provide and to furnish fitting and suitable maintenance and support to the plaintiff, has grossly, wrongfully and cruelly failed and refused so to do."

From a review of the record we are of opinion the district court would have been justified in granting the divorce on grounds other and additional to those named in the decree and that were supported by competent testimony. But no good nor necessary purpose would be subserved by a discussion herein of that feature of the case.

The judgment of the district court is right, and is

AFFIRMED.

CORNISH, J., not sitting.

KATHERINE FERBER, APPELLANT, V. FRANK LEISE ET AL., APPELLEES.

FILED JUNE 2, 1917. No. 19373.

Appeal: PRESUMPTIONS. Upon appeal all presumptions are in favor of the correctness of the judgment of the district court. If the record does not show affirmatively that the judgment is wrong, it will ordinarily be affirmed.

APPEAL from the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

John L. Webster, William R. King, R. J. Millard, C. A. Kingsbury, Oliver, Harding & Oliver and *Edward E. Baron,* for appellant.

Wilbur F. Bryant and *B. Ready, contra.*

MORRISSEY, C. J.

This is a proceeding in equity to obtain a new trial of a cause wherein judgment had been rendered against this plaintiff. The case was originally heard upon the petition of plaintiff and a demurrer thereto by defendant, and

upon appeal it was held that the petition stated a cause of action. *Ferber v. Leise,* 97 Neb. 795. On this appeal, counsel for appellant says:

"The gist of the action is that the attorneys for the plaintiff relied upon, and had a right to rely upon, their request to the court, and the court's acquiescence therein, that, if judgment should be rendered for the defendant, the usual and customary order would be entered allowing the plaintiff 40 days from the rising of the court to prepare and serve a bill of exceptions; that, by reason of inadvertence or mistake, this order extending time was omitted from the decree, and thereby the plaintiff, without any fault on her part, or that of her attorneys, was deprived of her constitutional right to an appeal from the judgment in the original action. It was to protect that right that the present bill in equity was filed to obtain a new trial."

On the trial the court found in favor of defendants. The case may properly be determined upon a consideration of the evidence without a review of the other questions raised. The only question of fact before the court on the trial of this case was: Had plaintiff been denied her right of appeal in the former case by reason of inadvertence or mistake on the part of the court in failing to extend the time for the preparation and service of the bill of exceptions after proper and timely request had been made therefor? On behalf of plaintiff, there is testimony to the effect that, after the taking of testimony was closed and the case had been argued to the court (but before the findings had been announced), the judge and others were visiting in the courtroom, when one of the plaintiff's attorneys said to the judge, "Well, Judge, if the case is decided against us, you will give the customary time for appeal?" and that the judge answered, "Yes." On cross-examination this witness, in referring to the request of the attorney, testified: "I rather think he did say bill of exceptions." The attorney who is said to have made the request testified that he said, "Save us, or give

us, the usual time for preparing bills of exceptions," and that he understood that the court assented thereto. This attorney also testified that the usual time allowed, when requested, was 40 days from the rendition of the judgment.

Another witness testified that, after the evidence was submitted and the case argued, the court indicated that he would not render a decision that evening, but would do so some time during the term, and that thereupon Judge Boyd, who was one of plaintiff's attorneys in that trial, stated that he was going away on an early morning train and would not be in court again during that term, and that, in the event judgment went against his client, "He would like the usual record for preparing the bill of exceptions."

Mr. Ready, one of the attorneys who represented defendants, testified that he was present in court when the case was submitted, and heard what was said by the attorneys representing plaintiff, and that there was nothing said about a bill of exceptions.

Mr. Bryant, another attorney for defendants, testified to substantially the same thing. He said: "There was a good deal of talk about a supersedeas bond, considerable discussion about that, and I heard Mr. Boyd say he was going away in the morning, but I didn't hear anything about a bill of exceptions." He says that conversations such as testified to by plaintiff's witnesses might have been had out of court.

The trial judge was a witness, and, when asked as to whether any request had been made for an extension of time, said: "I have no independent recollection other than appears on the trial docket and the custom that I have always followed." When asked what was his custom when asked for further time in which to prepare a bill of exceptions, he said: "I grant such time as is requested by counsel and note it on the trial docket. If they ask for 40 days from the rising of the court, that is granted. If they ask for 40 days from the rendition of judgment, that is the

order that is made. If no request is made, no order is entered." He further said that he remembered some little discussion with reference to fixing a supersedeas bond.

It is clear that every witness is honestly testifying according to his recollection of what occurred. But the record indicates that, if any request was made for an extension of time, it was informal and made while the court was in recess, and the court did not regard it of sufficient importance to enter it upon his docket. The same judge presided at each trial, and his recollection of what occurred appears to be just as clear as that of any other witness. The testimony offered on behalf of plaintiff is not so convincing that we can say the trial court erred in denying the prayer of plaintiff's petition.

The judgment is

AFFIRMED.

AMI L. GAUCHAT ET AL., APPELLANTS V. SCHOOL DISTRICT ET AL., APPELLEES.

FILED JUNE 2, 1917. No. 19863.

1. **Statutes:** CONSTITUTIONALITY. Chapter 121, Laws 1915, *held* not in violation of section 11, art. III of the Constitution.
2. **Schools and School Districts:** DETACHING TERRITORY. Evidence examined, and *held* to support the judgment of the trial court.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

Fred G. Hawœby and *S. P. Davidson,* for appellants.

Kelligar & Ferneau and *E. F. Armstrong, contra.*

MORRISSEY, C. J.

Plaintiffs, who are residents and taxpayers of school district No. 11 of Nemaha county, brought this action against the defendants to have declared null and void an order made under the provisions of chapter 121, Laws

1915, detaching certain territory from district No. 11 and attaching the same to district No. 5.

The board, created under the provisions of chapter 121, in a proceeding had in accordance with the provisions of that chapter, detached 1,280 acres of land from district No. 11 and attached the same to district No. 5. The district court denied plaintiffs the relief prayed, and they have appealed, pressing two questions only: First, it is said that the act is void because in violation of section 11, art. III of the Constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." The title of the act is as follows: "An act to provide for the equitable adjustment of the boundaries of school districts in certain cases, to provide for the consolidation of certain districts and transportation therein, to provide for attendance at the nearer school, to amend section 6942, Revised Statutes of Nebraska for 1913, to repeal said original section and declaring an emergency."

It is said that the act contains four different subjects, namely: "(1) The equitable adjustment of the boundaries of school districts in certain cases. (2) The consolidation of certain contiguous school districts. (3) The transportation of children to school in certain cases, at public expense. (4) The amendment and repeal of section 6942 of the Revised Statutes of 1913, providing for the attendance of children to the nearer school."

It is true that each of these subjects is mentioned in the title and is dealt with in the body of the act, but an analysis of the title as well as the act will show that there was but one main and general subject for the consideration of the legislature, namely, rural schools and rural school districts. Its various subdivisions relate to this main subject.

In *Van Horn v. State*, 46 Neb. 62, 72, Commissioner Irvine has written an exhaustive opinion on this subject, wherein he aptly says:

"The constitutional inhibition is against the bill's containing more than one subject. The title must clearly express the subject, but provided the bill itself contains but one subject, and this subject is clearly expressed in the title, it matters not although the title, read independently of the bill, may seem double. We, therefore, look to the bill itself to ascertain whether or not it contains more than one subject, and having ascertained that it contains but one, then we look to the title to see if that subject is clearly expressed therein. If so, the constitutional provision we are here discussing is not violated. Tested by this rule, we have no hesitation in saying that the subject-matter of this act is single, and that while a more comprehensive and shorter title might have been sufficient to indicate the contents of the bill, still the title which the legislature adopted does clearly indicate every essential feature of the act. * * * We conceive the rule to be that the constitutional provision does not restrict the legislature in the scope of legislation. It does not prohibit comprehensive acts, and no matter how wide the field of legislation the subject is single so long as the act has but a single main purpose and object. * * * It has always been said that the legislature might choose for itself its manner of legislation, and that an act, no matter how comprehensive, would be valid provided a single main purpose was held in view, and nothing embraced in the act except what was naturally connected with and incidental to that purpose."

This language is applicable to the case before us. His discussion of this subject is thorough and his review of the authorities so complete that it is sufficient to refer the profession to that opinion without an extended discussion here. Following the rule therein announced, we must hold that the act does not fall within the inhibition of the Constitution.

The sole remaining question has to do with the reasonableness of the order made by the board. Before the change in territory, district No. 11 had a daily average

attendance of 22 pupils, and the valuation of the property of the territory was $105,685. The school was maintained by a levy of 7 mills for school purposes. After the change of territory was made, the property valuation was $84,425, and the school was supported by a levy of 11 mills. Before the change in territory, district No. 5 had a daily average attendance of 149 pupils, and the property valuation was $116,067, the levy for school purposes being 35 mills, the limit allowed under the statute. Without this additional territory, district No. 5 would not longer have been able to maintain the 11 grades which it had theretofore maintained. Even with the territory which was added, the district made a levy of 33 mills. These figures seem sufficient answer to the statement that the board acted arbitrarily and inequitably. On the contrary, the order seems to be fully warranted under the proof, and the judgment is

AFFIRMED.

IN RE ESTATE OF FRANK HOWE.

CHARLES HOWE, APPELLANT, V. NANCY HARDENBERGER ET AL., APPELLEES.

FILED JUNE 2, 1917. No. 19480.

Descent and Distribution: ESTATE OF SPENDTHRIFT: DEGREES OF KINSHIP. Certain real estate which was inherited by the intestate, a spendthrift ward, was sold under partition proceedings brought by his cotenant. The ward's share of the proceeds of the sale was paid to his guardian. Money received from another source was also paid to the guardian, who used part of the commingled fund for the benefit of the ward, reinvested part, and held part at the time of the death of the ward, which he paid to the administrator. At the final settlement of the estate of the ward the whole of the fund was claimed as ancestral property by his only full brother. Certain half brothers and sisters also claimed to participate in the distribution by virtue of section 1275, Rev. St. 1913. *Held*, that, under the facts, the fund was not of an ancestral character, and should be distributed as other personal property.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

Kelligar & Ferneau, for appellant.

Lambert & Armstrong, contra.

LETTON, J.

Frank Howe died in 1913, intestate. He was unmarried, and his parents were both dead. He left surviving him the plaintiff, Charles Howe, who is his full brother, and the defendants, who are half sisters, and the children of a deceased half sister and of a deceased half brother. Frank Howe and Charles Howe inherited 160 acres of land from their father, Albert C. Howe. Mrs. Howe died in 1908. A guardian was appointed for Frank Howe in November, 1908, on account of his being a spendthrift. Afterwards Charles Howe brought partition proceedings to divide the land, which was found incapable of division, and was sold by order of court. Frank's share of the proceeds of the sale, $5,113.25, was paid to his guardian. There was also paid to the guardian from money due the ward from the estate of Mrs. Howe, $284.70. This commingled fund was part invested, part used for the benefit of the ward, the costs and expenses were paid from it, and at the time of Frank's death there was still on hand $4,165.50 of this money. This was paid to the administrator of the estate of Frank Howe. In the proceedings for the final settlement of the estate, plaintiff filed a cross-petition claiming all the residue of the estate, except $250 paid as damages for the death of the deceased, as being derived from the sale of the real estate, on the ground that, as the full brother of deceased, he inherits all the property received by Frank Howe from the estate of his father. Defendants insist they are entitled to share in the distribution. The issue to decide is whether the brother of the full blood should inherit the fund, or whether the children of the half blood are also entitled to share in it.

The decision of this case depends upon the construction to be given section 1275, Rev. St. 1913, which is as follows: "The degrees of kindred shall be computed according to the rule of civil law; and kindred of the half blood shall share equally with those of the whole blood, in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance."

An exhaustive note dealing with the whole subject of descent and distribution among kindred of the half blood may be found appended to *Anderson v. Bell,* 29 L. R. A. 541 (140 Ind. 575). So much labor and learning has been expended by the courts of other states on this subject that we believe it only necessary to call attention to the cases in which the subject is discussed.

The general tendency of this country is by statute to continue real estate in the blood of the ancestor. *Kelly's Heirs v. McGuire,* 15 Ark. 555. But it is also generally held that, when the real estate has been exchanged for other land or has been converted into money or other property, it loses its ancestral character. *Armstrong v. Miller,* 6 Ohio, 119; *Pence v. Pence's Adm'r,* 11 Ohio St. 290; *Kihlken v. Kihlken,* 59 Ohio St. 106; *Armington v. Armington,* 28 Ind. 74. It is also held that the rule which prevails in equity that a trust fund may be followed as long as it can be identified and segregated does not apply. *Patterson v. Lamson,* 45 Ohio St. 77; *Rountree v. Pursell,* 11 Ind. App. 522; *Stevenson v. Gray,* 46 Ind. App. 412. Where money has been received by an heir from the sale in partition or otherwise of lands descending to him without restriction or limitation, it does not retain its character as real estate, but he may use, invest, or dissipate it as if it came from any other source. *In re Simmons,* 55 Ark. 485; *Emerson v. Cutler,* 14 Pick. (Mass.) 108, 118; 9 R. C. L. 36-38. Nearly $300 of the fund claimed was not derived from the father's estate. The money coming from it was commingled. The specific property not being sep-

arated, distinguished, or kept apart, its ancestral character is lost. *Rountree v. Pursell,* 11 Ind. App. 522; *In re Simpson's Estate,* 144 N. Y. Supp. 1099.

In this state of facts, we are convinced that the property has lost its ancestral character. This was the conclusion reached by the county court and by the district court, and we believe that it is in harmony with the great weight of authority.

AFFIRMED.

SEDGWICK, J., not sitting.

FRANK SAMUELS V. STATE OF NEBRASKA.

FILED JUNE 2, 1917. No. 19888.

1. **Criminal Law:** REFUSAL OF INSTRUCTION. It is not error to refuse a requested instruction confined to a proposition of law correctly stated to the jury in another form.
2. **Information:** INDORSEMENT OF WITNESS. Under the Criminal Code as amended in 1915, it is within the discretion of the court to permit the county attorney to indorse on the information, after the trial has commenced, the name of an additional witness. Laws 1915, ch. 164.
3. **Criminal Law:** INSTRUCTIONS. Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed by the appellate court merely because a single instruction, when considered separately, is incomplete.

ERROR to the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

T. J. Doyle, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe, contra.*

ROSE, J.

In a prosecution by the state in the district court for Lancaster county, Frank Samuels, defendant, was convicted of stealing an automobile belonging to Ferdinand Rucklos, and for that offense was sentenced to serve in

the penitentiary a term of not less than one year nor more than seven years. As plaintiff in error he presents for review the record of his conviction.

During the evening of August 11, 1916, Rucklos drove his automobile to the pleasure resort at Capital Beach, where his family had gone in the afternoon for a picnic. When the car was unoccupied, defendant took possession of it and drove out of the grounds. Before noon of the following day, he appeared at Fairfield, Iowa, and there offered the car for sale. News that it had been taken from Capital Beach soon reached the sheriff at Fairfield. In the meantime the initials of Rucklos had been removed from the body of the car. Defendant left it at a garage. Within two hours he was arrested a few miles from Fairfield while attempting to escape on foot, and promptly confessed to the taking of the car.

One of the assignments of error is the refusal of the trial court to give a requested instruction that, if the owner of the automobile was within the jurisdiction of the court, it was incumbent upon the state to prove by him that he did not consent to defendant's taking of his automobile. In this respect the charge as a whole gave defendant the benefit of the law invoked by him. It is not error to refuse a requested instruction confined to a proposition of law correctly stated to the jury in another form. The trial court instructed that nonconsent of the owner is a material element of the crime, and must be proved beyond a reasonable doubt; that the owner's testimony is the best evidence on that issue; that where he is not called as a witness, if his absence is "satisfactorily accounted for," his "nonconsent may be proven by circumstantial evidence, that is, the facts and circumstances as proven must be such as to exclude every reasonable presumption that the owner consented to the taking." The proof seems to warrant these statements, and they contain the substance of the rule embodied in the rejected instruction requested by defendant. It may fairly be inferred from the testimony that Rucklos was not within the juris-

diction of the court at the time of the trial. The jury were justified in finding that his automobile was taken without his consent. The assignment is therefore overruled.

Another assignment of error relates to the indorsement of the name of a witness on the information after the trial had commenced. The statute relating to the filing of an information has been changed to provide that the county attorney shall "indorse thereon the names of the witnesses known to him at the time of filing the same," and that "at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him." Laws 1915, ch. 164. The statute formerly authorized the indorsement of additional names on the information "at such time before the trial of any case as the court may by rule or otherwise prescribe." Rev. St. 1913, sec. 9063. The purpose of the change is clear. The record shows that the court did not abuse its discretion in permitting the name of the witness to be indorsed on the information after the trial had commenced.

Defendant singles out one of the instructions, and argues that it permits the jury to find a larceny was committed without evidence establishing the crime beyond a reasonable doubt; that it assumes facts not proved; that it gives prominence to assumed facts; that it gives undue importance to the possession of the property; and that it withdraws from the jury evidence of defendant's good character. When the charge to the jury is considered as a whole, the law is correctly stated. An instruction preceding the one assailed enumerated the elements of the crime, and distinctly stated that each must be proved to the jury's satisfaction beyond a reasonable doubt. Another instruction correctly stated the law relating to evidence of defendant's good character. There was testimony relating to all of the matters mentioned in the instruction. The point is not well taken.

It is further argued that the court erred in refusing to give the following instruction requested by defendant:

"There must be evidence, aside from the statements of the defendant out of court, that the automobile was stolen, otherwise it is the duty of the jury to acquit the defendant."

Under the evidence the request was properly refused. The instruction is not limited to the rule that an extrajudicial confession is not of itself sufficient to establish the *corpus delicti*. There was other evidence tending to show that the automobile was stolen. In addition, statements of defendant not constituting a part of his confession were proper matters to be considered by the jury.

Error in the proceedings has not been shown. The judgment is therefore

AFFIRMED.

EDWARD E. MORAN, APPELLANT, V. ROBERT C. MORAN ET AL., APPELLEES: CAMDEN J. GARLOW ET AL., APPELLANTS.

FILED JUNE 2, 1917. No. 19458.

1. **Common Law:** LAW OF STATE. Any provision of the common law of England that is inconsistent "with any law passed or to be passed by the legislature of this state" is not made the law of this state by section 3697, Rev. St. 1913.
2. **Deeds:** CONSTRUCTION. Every instrument conveying real estate or interest therein must be construed so as "to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument," if the intent is not an unlawful one. Rev. St. 1913, sec. 6195. This applies to deeds as well as other instruments, and so far abrogates the rule in Shelley's case.
3. ———: ———: LIFE ESTATE. Applying these rules, the granting clause of the deed involved in this case is construed to convey to the grantee a life estate with remainder to his heirs.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Albert & Wagner and *Garlow & Long,* for appellants.

A. M. Post and *M. Whitmoyer, contra.*

J. J. Thomas and *Edwin Vail, amici curiæ,* on rehearing.

SEDGWICK, J.

On the trial of this case in the lower court the deeds involved were construed to convey life estates only. The plaintiff and cross-petitioner now contend that these deeds conveyed a title in fee to the grantees named therein. The cross-petitioner Garlow refers in his brief to some former decision of the district court as a bar to this action, but as no such decision is alleged in the pleadings, and no serious discussion is given it, and both the plaintiff and the cross-petitioner devote their discussion entirely to the construction of the deeds involved, we conclude, as stated by the defendants, that the decision of the district court rests entirely upon the proper construction of the deeds. The following is the granting clause of the deed to be construed:

"Grant, bargain, sell, convey, and confirm unto R. C. Moran, of Platte county, Nebraska, the following described real estate situated in the county of Platte, and state of Nebraska, to wit: (describing the land) Subject however to the following conditions: First, that the said R. C. Moran shall have, hold, use, occupy, and enjoy the aforesaid premises with all rents, issues, profits, and proceeds arising therefrom, for his own use and benefit, shall have authority to lease said premises, but shall not bargain, sell, or mortgage said premises during his natural lifetime, but upon his death said premises shall be the property of his lawful heirs. Second, that said R. C. Moran shall pay to the said Robert Moran from the proceeds of said premises $50 each and every year during the natural life of said Robert Moran. Together with all the tene-

ments, hereditaments, and appurtenances to the same belonging, and all the estate, right, title, interest, dower, claim or demand whatsoever of the said Robert Moran and Sarah Moran of, in, or to the same, or any part thereof."

There is some discussion in the briefs as to whether the rule in Shelley's case has any force in this state, but it is not necessary to determine what force, if any, that rule has with us. The cross-petitioner, as was done in *Albin v. Parmele,* 70 Neb. 740, quotes extensively from the courts of the different states as to the effect of the rule in Shelley's case in those states respectively. In Pennsylvania it was said: "The rule in Shelley's case is a rule of law, not a rule of construction, and where a case falls within it, it applies inexorably without reference to intent." *Shapley v. Diehl,* 203 Pa. St. 566. And in Tennessee: "The rule in Shelley's case was brought over by our ancestors, formed part of the colonial laws, and, until abrogated by statutory enactment, must continue to be law in Tennessee." *Polk v. Faris,* 30 Am. Dec. 400 (9 Yerg. (Tenn.) 209).

In so far as the decision of the case at bar is concerned, we might concede that the rule in Shelley's case would continue and be the law in Nebraska, "unless abrogated by statutory enactment." It is difficult to determine the origin of that rule. It probably arose out of some peculiarities of the law of feudal tenures in England a good many hundred years ago. Our statute provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska." Rev. St. 1913, sec. 3697. By section 6195, Rev. St. 1913, it is provided: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice

to carry into effect the true interest (intent) of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." This latter statute has been construed by this court in *Rupert v. Penner,* 35 Neb. 587; *Albin v. Parmele, supra; Benedict v. Minton,* 83 Neb. 782, and in other cases. In *Albin v. Parmele, supra,* there is quite an exhaustive discussion of the subject in an opinion by Mr. Commissioner Ames, and, unless that is to be overruled, it must be decisive of this case. Two of those above cited cases of this court discussed the construction of granting clauses in deeds, and one construed such clause in a will, and it is suggested in the brief that a different rule might obtain in the construction of deeds, but section 6195, Rev. St. 1913, applies to every "creation or conveyance of any real estate, or interest therein," and, as pointed out in *Albin v. Parmele, supra,* wills in some instances are not as deliberately executed as are deeds in general, and therefore the effect of the use of technical terms in wills may not always have the same force as the use of similar terms in deeds might have in ascertaining the "true intent of the parties;" but, in any event, in both cases we are required to ascertain that intent from the whole instrument. It is said in one of the briefs that the rule in Shelley's case is the law, and any intent that is inconsistent with the law cannot be enforced by the very terms of the statute quoted. This suggestion is answered in *Albin v. Parmele, supra,* with the suggestion: "That which the statute expressly requires shall be consistent with the general rules of law is not the construction of the instrument, but the intent of the parties. * * * It cannot be pretended that an intent to limit a remainder in fee to the heirs at law of one to whom is given the precedent freehold is inconsistent with any general rule of law."

The language of the granting clause of this deed so plainly shows an intent of the grantor to convey to the grantee a life estate with the remainder to his heirs that it cannot be said that the language needs any construc-

tion. This language was correctly construed by the district court, and the judgment is

AFFIRMED.

The following opinion on motion for rehearing was filed October 13, 1917. *Remanded for further proceedings on question of partition of life estates.*

SEDGWICK, J.

The briefs upon the motion for rehearing by the appellants and by members of the bar who have appeared as friends of the court thoroughly present some of the questions involved in this case, from which it appears that our former decision, *ante,* p. 386, may be misunderstood or misleading, and some further explanation seems appropriate.

1. It is earnestly contended by appellants that "the conclusion reached by this court is in direct conflict with the doctrine announced in that case (*Loosing v. Loosing,* 85 Neb. 66), but that is not overruled, distinguished, or even referred to in the opinion." In the case referred to the court, in discussing the principle that, "if a testator in his will devises an estate in fee simple, a subsequent clause attempting to devise over any part of that estate is void," used the following language: "The difficulty arises in applying the rule to the facts in the particular case. The rule does not of necessity apply merely for the reason that the first clause considered by itself might be construed as conveying a fee simple. The later clause, or clauses, may be read in connection with the first one for the purpose of advising the court whether it actually did transfer the fee." This expresses a familiar principle of construction, and we intended to apply it in the case at bar. In the *Loosing* case the will gave absolutely to each of several children certain described real estate, and then, after various other provisions, contained the following clause: "I want it distinctly understood that the property I have herein bequeathed to my two sons and one daughter that they shall not have the right to dispose or mortgage same,

but it shall be handed down to their children." In commenting upon this peculiar provision the court said: "If the testator intended that William, Fred and Louise (the children to whom the land had been devised in the will) should only take a life estate, a remainder could not descend or 'be handed down' from them, and their children could not receive an estate, except from the testator and through his will, and he nowhere in that instrument devises anything to the children of his children."

The language of the deeds construed in the case at bar is essentially different in two particulars: (1) It is quoted in our former opinion, and it will be observed that in connection with the granting clause and as a part thereof are the words "subject, however, to the following conditions." Then follows specifically the conditions of the grant, from which it plainly appears that the grant was not absolute. (2) The conveyance also contained the following words: "Upon his death (that is the grantee named) said premises shall be the property of his lawful heirs." These words passed the title in the remainder directly from the grantor to the lawful heirs by the force of the deed itself. The title in the remainder therefore does not pass through the grantee in the deed, but from the grantor himself, which is considered of vital importance in construing the conveyance in the *Loosing* case.

2. The appellants and the friends of the court strongly contend that our former opinion is wrong in not recognizing "the rule in Shelley's case as a part of the law in this state." It is insisted that the quotation in our former opinion from *Albin v. Parmele,* 70 Neb. 740, in regard to the rule in Shelley's case, should not be "invoked for the purpose of ascertaining the intention of the grantor," and therefore should not be considered as abrogated or affected by our "intent" statute. Judge J. J. Thomas and his partner, Edwin Vail, as friends of the court, have filed an exhaustive and interesting brief upon this question. The history of the rule in Shelley's case is given, and many authorities are cited which seem to support the view

contended for. Among them are Judge Cooley in his edition of Blackstone's Commentaries, 1 Blackstone's Commentaries (4th ed.) Book 2, *172, note 2; 1 Fearne, Contingent Remainders (4th Am. ed.) 85, 86; 4 Kent, Commentaries, *215; *Hamilton v. Sidwell,* 131 Ky. 428, 29 L. R. A. n. s. 961, and note; *Perrin v. Blake,* 10 Eng. Rul. Cas. 689; *Baker v. Scott,* 62 Ill. 86; *Starnes v. Hill,* 112 N. Car. 1; *Doyle v. Andis,* 127 Ia. 36. In our former opinion it was said: "We might concede that the rule in Shelley's case would continue and be the law in Nebraska, 'unless abrogated by statutory enactment.'" If the discussion in that opinion following this statement indicates that we consider that the rule in Shelley's case is abrogated in whole or in part by the "intent" statute (Rev. St. 1913, sec. 6195) we desire to modify that opinion in that respect, as it is not necessary in this case to determine that question.

3. It is now urged that in any case the parties are entitled to have a partition of their life estates, and that we should have reversed and remanded the case for that purpose. The original briefs of appellants and cross-appellants do not comply with rule 12 (94 Neb. XI), and we have not observed that they discuss or mention any right of partition of life estates. These estates were separate under the conveyances to them, and, if they have been united by the acts of the grantees, they might very well waive the question of their right to have the court adjudicate their rights as against each other. Ordinarily questions not discussed in the briefs are considered waived. We do not ordinarily reinvestigate the record upon motion for rehearing for the purpose of determining questions not presented in the briefs upon the hearing of the case. As we try equity cases *de novo,* we will not now determine the right of partition of the life estates, and this decision will not be a bar to further proceeding for that purpose, if it should be found necessary.

The motion for rehearing is overruled, reserving the question of partition of the life estates, and the cause is

remanded to the district court for further proceedings upon that question.

JUDGMENT ACCORDINGLY.

ANNA JANOUS, APPELLANT, V. COLUMBUS STATE BANK, APPELLEE.

FILED JUNE 2, 1917. No. 19506.

1. **Appeal.** The fact that the plaintiff has recovered a judgment in a foreign jurisdiction upon a judgment rendered in this state will not require this court to dismiss an appeal regularly taken from the original judgment, or from a judgment in an action in equity to vacate the former judgment.
2. **Judgment: VACATION: EFFECT ON FOREIGN RECOVERY ON DOMESTIC JUDGMENT.** In such case, if the original judgment is set aside and final judgment entered in favor of the defendant in the original action, the judgment in the foreign jurisdiction will be voidable.
3. **Process: SHERIFF'S RETURN: PRESUMPTION.** When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of the sheriff's return is assailed, great faith and credit must be given to the formal return of the officer.
4. **Judgment: SUIT TO VACATE: SERVICE OF PROCESS: EVIDENCE.** In an action to set aside the service and the judgment entered therein, if the validity of the service depends upon the facts, and the officer and the persons present when the supposed service is made testify in detail as to the facts of service, and the preponderance of the evidence shows that no legal service was made, the service and judgment will be set aside and a new trial ordered.
5. **Process: SERVICE OF SUMMONS: EVIDENCE.** If the officer hands the copy of the summons to the defendant, and immediately retakes it and does not return it to defendant, the proof must show that the defendant knew, or had reason to suppose, that it was a summons for her, and that she had been sued, or such service will be invalid.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Reversed, with directions.*

Garlow & Long, for appellant.

A. M. Post and *Albert & Wagner, contra.*

SEDGWICK, J.

The defendant bank began an action against the plaintiff in the district court for Platte county and obtained a judgment. Afterwards the plaintiff began this action in the district court for Platte county, which is an action in equity to set aside the former judgment. It was decided against the plaintiff in the district court, and she has appealed to this court.

The bank began an action in Colorado against the plaintiff herein upon the first judgment obtained in the district court for Platte county, and obtained a judgment in Colorado upon a transcript of that judgment. Afterwards the defendant bank moved to dismiss this appeal. This motion was continued to the final hearing upon the appeal. The defendant contended: "If, pending an appeal, an event occurs which makes a determination of it unnecessary or renders it clearly impossible for the appellate court to grant effectual relief, the appeal or writ of error will be dismissed without prejudice." 4 C. J. 584. There is no doubt about the correctness of this rule, but the question in this case is whether obtaining the judgment in Colorado will prevent this court from granting effectual relief. The plaintiff cites several cases holding that it will not. In *Heckling, Ex'x, v. Allen,* 15 Fed. 196, the first paragraph of the syllabus is: "Suit was brought in Colorado on a judgment rendered by the superior court of Cook county, Illinois, and judgment was rendered here. Subsequently the Illinois judgment, the case being removed by writ of error to the appellate court of that state, was reversed. Defendant sets up these facts in a petition, and moves that the judgment be vacated. Held, that such proceeding is allowable." *Hawes v. Hathaway,* 14 Mass. *233, *Brennan v. Berlin Iron Bridge Co.,* 73 Conn. 412, and *Ætna Ins. Co. v. Aldrich,* 38 Wis. 107, seem to support the rule in the Federal Reporter. The action in Colorado was

strictly upon the former judgment in this case, and, if that judgment is vacated and judgment finally entered for defendant, the Colorado court will no doubt vacate its judgment also.

As this case is presented, there is but one question now to be considered, and that is as to the service of the summons in the original case. The defendant bank, plaintiff in the original suit, in its brief says: "The sheriff's return made under the solemnity of his official oath is presumptively true, and impeachable only upon the clearest and most unmistakable proof of its falsity." When a judgment is attacked collaterally, or when a long time after the judgment is entered the correctness of the sheriff's return is assailed, there is no doubt that great faith and credit must be given to the formal return of the officer. In this case, however, the evidence of the officer who made the service was taken soon after the service was made, and he tells in detail the facts connected with the service. Under these circumstances we think that the validity of this service depends upon the facts as testified to by the sheriff and the other witnesses present. From his evidence it appears that the plaintiff in this case, defendant in the original action, "was quite an elderly lady; she appeared to me to be about—oh, I don't know, at least 70 or 75; she was quite old." He says, "She spoke German." The original action was upon a promissory note which the plaintiff therein alleged was signed by this plaintiff and several of her sons-in-law and daughters. The plaintiff, who was a resident of Colorado, was at the home of one of her daughters to attend a funeral of the daughter's little child. The evidence shows without contradiction that the plaintiff was not familiar with the English language and could speak it very little. On the day of the funeral the sheriff says: "I went up to the residence, and some young lady, I don't know who she was, came to the door, and I asked for Mrs. Janous, I asked if Mrs. Janous was there, and she said, 'Yes.' So she called her to the door, and I told her that I had a summons for her. Q. Were you

speaking in German or English? A. No; I was speaking in English at the time, and she evidently didn't understand me, and so I asked the girl there, whoever she was, if the old lady could speak German, and she said, 'Yes,' and so I told her in German, *as near as I could,* that it was a summons, that she was sued by some party, and that it was necessary for me to deliver the paper to her. She accepted the paper, and spoke to the girl." This girl the sheriff speaks of was the plaintiff's daughter, and was one of the defendants in the case. The sheriff was not aware of that fact at the time. The sheriff testified: "The girl ask me what the old lady should do about the paper, and I said she could do as she pleased about it. Q. Were you speaking in German? A. No, to the girl I was speaking in English. She could do as she pleased with it, and I suggested that I would, if she wanted me to, that I would take the paper and give it to Joe, but I also had a summons for Joe anyway." The sheriff says that he handed the summons to the "old lady," and "then she returned it to me, and told me in German to give it to Joe." The plaintiff and her daughter deny that the summons was ever handed to her at all. However that may be, the sheriff immediately took it, according to his testimony, and delivered it to Joe. As Joe was one of the principal defendants in the case, it was, of course, necessary to deliver him a copy in order to make the proper service. The sheriff nowhere testifies that this plaintiff knew that the paper he was handing to her was a summons, or that she had been sued. He testifies that he told her that in German, "as near as I could." How well he could speak German and how plain he could make it to her is not indicated, but the statement that he told her as near as he could indicates that he could not speak German fluently. She testifies that she never knew that it was a summons or that she had been sued until after she had returned to Colorado and was notified that they had a judgment against her in this state. The supposed service was on Saturday, and on Monday the plaintiff returned to her

home in Colorado. The plaintiff testifies that she never signed the note sued upon. There is no proof that she was a principal on the note. If her sons-in-law had the entire consideration for the note, and if this plaintiff received nothing for the note, and believed that she never signed it, she would naturally not be very curious about papers connected with it. And if the sons-in-law had placed, or caused to be placed, the plaintiff's name on the note, it is not at all certain that they would take any great pains to inform her that she had been sued thereon. At all events, if the sheriff handed the summons to her and immediately retook it, as he says he did, it would not amount to service without clear proof that she received it with knowledge that it was service of a summons. Such proof is entirely lacking. The preponderance of the evidence is that this plaintiff knew nothing about the nature of the paper, but in good faith supposed it was some matter relating to local affairs that could be attended to by Joe, as he is called, one of the principal defendants in this case. This being an action in equity, we must determine it upon the evidence in the record without reference to the findings of the trial court. Of course, under our former decisions, if there was plainly a conflict in the testimony between the sheriff and this plaintiff, the fact that the court saw these witnesses and heard them testify would have influence with this court in determining that fact; but as we view this evidence, it does not appear clearly that there is a substantial conflict in this testimony upon the controlling facts in the case. These three witnesses appear to testify in good faith, and, as we have said, the preponderance of the evidence is that the summons was not delivered to and left with this plaintiff; it was immediately retaken by the sheriff, and the plaintiff had no actual knowledge of the nature of the paper that was shown to her.

The judgment of the district court is reversed and the cause remanded, with directions to set aside the original judgment and grant a new trial therein.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting.

The following opinion on motion to amend judgment was filed November 3, 1917. *Former judgment modified and cause remanded, with directions.*

SEDGWICK, J.

The defendant has filed a motion to amend the former judgment of this court by eliminating therefrom the direction for final judgment, and so as to remand the case for further proceedings in the district court. The defendant suggests that the Colorado court had jurisdiction in the action upon the transcript of the judgment to determine the question of the jurisdiction of the court of this state over the person of the defendant in that case, and that therefore the judgment of the Colorado court is binding upon this court. There is no doubt of the general proposition that in an action upon a foreign judgment the court may try the question whether the foreign court had jurisdiction of the action or of the person of the defendant therein. But that principle has no application in this case. In our former opinion, *ante,* p. 393, we quoted the statement from 4 C. J. 584, relied upon by the bank, but it was suggested in the opinion that, although the rule as stated was undoubtedly correct in general, it was not decisive of this case, because the question here presented is whether the Colorado court could prevent this court from granting effectual relief. The statement copied from 4 C. J. is, in the text, immediatedly followed by the statement: "If, however, the intervening event was due to the voluntary act of appellee the appeal will not be dismissed." If this was not so, that is, if the intervening event was due to the act of the appellee himself, and the appellee could then insist upon that act as grounds for dismissing the appeal, he might by proceeding upon his judgment in a foreign court prevent or at least very much limit the time allowed the judgment debtor for perfecting his appeal. As soon as he obtained his judgment he might proceed in another state, and if he could obtain a judgment there upon his transcript before the appeal could be heard in the courts of the state of the original judg-

ment he would then be entitled to have the appeal dismissed. He cannot in that manner oust this court of jurisdiction. The courts of one state must give full faith and credit to the final judgment of the courts of another state, but a judgment is not final in that sense as long as the courts of the state that render the judgment have jurisdiction under their practice to vacate or modify that judgment. In a note to *Dunstan v. Higgins*, 20 L. R. A. 668, 677 (138 N. Y. 70) it is said: "A foreign judgment will not be enforced unless it be final and conclusive. * * * If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may, between the same parties, be afterwards contested in that court, and, upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then it cannot be regarded as finally and conclusively evidencing the debt." "If the first judgment is reversed after suit has been brought and judgment recovered on it in a foreign jurisdiction the defendant is entitled to have the second judgment reversed by *audita querela*, or a writ of error *coram nobis*, or other appropriate proceedings." 15 R. C. L. 942, sec. 419. This is in accordance with *Heckling, Ex'x, v. Allen*, 15 Fed. 196, and other cases cited in our former opinion.

The defendant suggests that it desires to present this question to the supreme court of the United States, and considers that in doing so it would be in a better position if a transcript of the Colorado judgment was in evidence in this case. The contention of the defendant is an interesting one, and it seems proper to permit the defendant to present it to that court without the embarrassment which it suggests. It is therefore ordered that our former judgment be modified, and that the judgment of the district court be reversed and the cause remanded, with instructions to allow the parties to put in further evidence, if so advised, and proceed further in the case in accordance with this opinion.

JUDGMENT ACCORDINGLY.

CONCRETE STEEL COMPANY, APPELLANT, V. ROWLES COMPANY; NATIONAL SURETY COMPANY, APPELLEE.

FILED JUNE 2, 1917. No. 19557.

1. **Counties:** CONTRACTS: BONDS. It is the duty of a county board, in letting a contract for the construction of a county building, to take a bond of the contractor conditioned as required by section 3840, Rev. St. 1913.
2. ———: CONTRACTOR'S BOND: LIABILITY FOR MATERIALS. A contractor for the construction of a public building who purchases material from a dealer who has no contract for the construction of any part of the building, and pays such dealer therefor in good faith, without notice of any liability of such dealer, will not be liable on his bond under section 3840, Rev. St. 1913, to the manufacturer or jobber from whom such dealer may have purchased such material.
3. ———: ———: ———. In such case the manufacturer or jobber who has notice that the contractor is purchasing the materials from the dealer and paying him therefor in good faith, and makes no objection to such payment, will not be allowed to recover on the contractor's bond for any balance of the selling price that may be due him from such dealer.

APPEAL from the district court for Webster county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

L. H. Blackledge, for appellant.

Bernard McNeny, contra.

SEDGWICK, J.

The defendant, Rowles Company, was a general contractor with the county of Webster for the construction of a court house, and gave the bond in suit, with the National Surety Company as surety. This plaintiff, at the request of Julian S. Nolan Company, furnished material used in the construction of the building. The plaintiff brought this action in the district court for Webster county against the Rowles Company, the original contractor, and the National Surety Company as surety for said contractor. There was no service upon the Rowles Company, and the

action proceeded against the surety company alone. Upon the trial the court instructed the jury to find a verdict for the defendant, upon which verdict judgment was rendered, and the plaintiff has appealed.

It appears that the bond given by the contractor contained the provisions: "(11) That no right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee herein named; * * * (7) Nor shall this instrument or any rights thereunder be assignable, unless with the like consent of the defendant duly executed and attested * * * by its president or vice president and under its seal." The bond was given to the county as obligee. The defendant insisted upon the trial, under the provisions of the bond above quoted, that no action could be brought by any one except the county.

The statute (Rev. St. 1913, sec. 3840) provides: "It shall be the duty of * * * county boards * * * and all public boards now or hereafter empowered by law to enter into a contract for the erecting and finishing, or the repairing of any public building * * * to which the general provisions of the mechanics' lien laws do not apply, and where the mechanics and laborers have no lien to secure the payment of their wages and materialmen who furnish material for said work have no lien to secure payment for material furnished in said work, to take from the person, persons, firm or corporation to whom the contract is awarded a bond in a sum not less than the contract price with at least two good and sufficient sureties, or in lieu thereof, by one surety company, conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used in the erecting, furnishing, or repairing of the building or in performing the contract. Such bond shall be to the board awarding the contract, and no contract shall be entered into by such board until the bond herein provided for has been filed with and approved by said board. Such bond shall be safely kept by the board

making the contract, and may be sued on by any person entitled to the benefit of this chapter."

It therefore appears that the bond given in this case is not upon its face a compliance with this statute, and is not in fact a bond under the statute. It is contended, however, that it must be construed as the statute provides, and that the defendant cannot be allowed to defend on the ground that it has incorporated in the bond the provisions not allowed by the statute. It would seem that, unless it can be so construed, the county board has not performed its duty under the statute, which duty is expressly made mandatory upon the board, and the question might arise whether the remedy would not be against the individual members of the board so failing to perform their duty. However, in the condition of this record, it does not seem to be necessary to determine either of these important questions.

It appears that the contractor, Rowles Company, purchased from the Julian S. Nolan Company of Chicago a quantity of reinforcing steel called for by their contract with the county. Their agreement expressly provided:

"Julian S. Nolan Company agree to accept the receipted freight bills at present car-load freight rates to Red Cloud, Nebraska, in partial payment of their steel and tile bills. Should default be made in prompt payment of any sum or sums due hereunder, according to the terms hereof, and at any time thereafter so long as the Rowles Company remain in default, Julian S. Nolan Company may at their option, without prejudice to any of their rights hereunder, stop shipments then and thereafter in transit, and either discontinue further shipments or make same upon any condition regarding payments due or to become due that Julian S. Nolan Company shall deem necessary for their protection. * * * It is agreed that Julian S. Nolan Company shall not be held accountable for delays caused by fires, accidents, strikes or other causes unavoidable or beyond their control. Whatever steel is desired from stock will be paid for by the Rowles

Company at the exact stock extra charged by the warehouse, but not to exceed $11 per ton above current mill steel prices."

From which it appears that it was understood that the Nolan Company was a dealer in this line of materials and kept such material in stock, but might find it necessary to replenish the stock or purchase materials from other dealers or manufacturers. The contention of the plaintiff is that under these circumstances the Rowles Company, contractor, was required to know whether the Nolan Company replenished its stock, and, if so, when and from whom it made the necessary purchases; that is, the plaintiff contends that under the statute the contractor, and his surety are liable to the manufacturer, or any person who may have been the owner, for any and all material that is actually furnished to the contractor and by him used in constructing the building. There is an interesting and somewhat exhaustive discussion in the briefs upon this question, and *United States v. American Surety Co.*, 200 U. S. 197, *Hardaway v. National Surety Co.*, 211 U. S. 552, *Mankin v. United States*, 215 U. S. 533, *Hegener Co. v. Frost*, 60 Ind. App. 108, *Forman v. St. Germain*, 81 Minn. 26, *Caulfield v. Polk*, 17 Ind. App. 429, Phillips, Mechanics' Liens (3d ed.) sec. 51, and *Monroe v. Clark*, 107 Me. 134, 30 L. R. A. (n. s.) 82, are cited as bearing upon this question. We do not find it necessary under the circumstances in this case to enter upon an exhaustive discussion of the questions involved in this contention. There must be some limit to such liability. A nail manufacturer sells to a jobber, who in turn sells to a hardware merchant, who subsequently fails, and his stock is sold at public sale by the referee in bankruptcy. A purchaser of a keg of nails at such sale exchanges it with another hardware merchant for other goods, and the latter sells it to the contractor, and the nails are finally used in the construction of the building, but the manufacturer has not been paid for them. The contention of the plaintiff seems to go so far as to hold the contractor's sureties liable to

the manufacturer for the selling price of the nails. A subcontractor, that is, one who undertakes to construct some definite part of the building, in some sense represents the contractor, and he represents the owner of the building. He is known by all parties interested in the construction of the building, and in contracting with him he can be held to guarantee, if necessary, that he will pay for the materials and labor he uses in constructing his part of the building. The cases cited seem to make a distinction between a subcontractor and a materialman, and hold the contractor and his sureties liable for materials and labor furnished to a subcontractor, and not liable to the manufacturer or dealer from whom a materialman may have purchased his stock. It appears, as already stated, that the contractor purchased this material of the Nolan Company, and understood that payment was to be made to that company. That company had no contract for the construction of any part of the building; it was not a subcontractor within the strict meaning of that term. The bills for the material were rendered by the Nolan Company to the contractor, and were paid to the Nolan Company without notice to the contractor that any other parties were interested therein. It is true that the Nolan Company ordered this material from the plaintiff company, and that it was shipped to the contractor directly by the plaintiff. While the material was being shipped, the Nolan Company wrote the plaintiff as follows:

"Gentlemen: Your mill order C 1041. We inclose herein freight receipt from the Burlington road for $403.20. Your freight allowance amounted to only $256.44, which leaves an overcharge of $146.76, and I will ask you to kindly credit our account with the amount of this overcharge, namely, $146.76. The contractor has taken credit for this overcharge collected from him in error by the Burlington, and, as you are the shipper, you should assume this overcharge and thrash the matter out with the railroad. We called the railroad's attention to the overcharge in our letter of June 29, and we have received a

reply from the auditor of freight accounts, dated July 7, giving their claim number as follows: 911852-57. Yours very truly."

This shows that the contractor was paying Nolan Company for the materials, and that plaintiff was relying upon the Nolan Company for payment, and that the contractor was not aware that the plaintiff was interested financially in the shipment. The contractor had reason to suppose, and did suppose, that the material actually used in the construction of the building was paid for. The plaintiff knew that it was so understood by the contractor. The plaintiff was satisfied to have payment for the material made through the Nolan Company, relying upon that company as authorized to receive such payment, recognizing such payment as payment to the plaintiff, and, by neglecting to notify the contractor, consented to such payment. If the plaintiff was not entirely satisfied to have these payments made to the Nolan Company, it should have at once notified the contractor. Failing to do so, it ought not now to be allowed to collect payment the second time from the contractor.

It follows that the judgment of the district court is right, and it is

AFFIRMED.

EMIL H. MILLER, APPELLANT, V. MARY ANN MILLER ET AL., APPELLEES.

FILED JUNE 2, 1917. No. 19954.

1. **Homestead: EXEMPTION: ALIMONY.** The liability for alimony in a divorce case is not a contract liability, and a government homestead of 640 acres, commonly called a "Kinkaid homestead," is not exempt from levy upon a judgment for alimony, under the United States statute which provides for exemption from "any debt contracted prior to the issuing of the patent therefor." Rev. St. U. S. 1878, sec. 2296.

2. ———: ———. The exemption of a homestead under our state statute is limited to 160 acres occupied as a family home.

3. Execution: EXEMPTION. Property of defendant, not exempt, acquired after judgment rendered against him, may be sold upon execution to satisfy the judgment.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

E. D. Crites and *F. A. Crites,* for appellant.

Allen G. Fisher and *Roscoe L. Wilhite, contra.*

SEDGWICK, J.

The defendant, Mary Ann Miller, obtained a divorce from the plaintiff in November, 1909, in the district court for Sheridan county, and a judgment for $800 alimony. In August, 1908, the plaintiff made a homestead entry on a tract of land in said county under the homestead laws of the United States, and afterwards in May, 1910, made an additional homestead entry. The two entries covered a Kinkaid homestead. In June, 1910, an execution was issued on the defendant's judgment and was returned unsatisfied in August, 1910. In August, 1911, the plaintiff intermarried with Leta Miller, with whom he has since been living as his wife, and they established their home upon one of the quarters of land above mentioned. Afterwards in October, 1914, another execution was issued, which was returned in November of that year unsatisfied for want of property. In June, 1916, a third execution was issued and was levied upon all of the said land, except the quarter section thereof upon which the residence and other improvements of the plaintiff are situated. The plaintiff then began this action in the district court for Sheridan county to enjoin the sale upon execution of the land levied upon. A temporary injunction was allowed, and afterwards upon the trial the temporary injunction was dissolved, and there was a general finding in favor of the defendants, and the plaintiff's action dismissed. From this judgment the plaintiff has appealed.

The plantiff contends that, as the land so levied upon is a part of the government homestead, it is not liable in

satisfaction of this claim which originated prior to the issuing of the patent. The Revised Statutes of the United States (Rev. St. U. S. 1878, sec. 2296) provides: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." It appears that this statute has been construed by the federal courts. The circuit court of appeals of the district of Colorado decided in *Brun v. Mann,* 151 Fed. 145, 12 L. R. A. n. s. 154: "The exemption of lands acquired under the homestead laws and the timber culture laws (2 U. S. Comp. St. 1901, pp. 1534, 1535; Act March 4, 1896, c. 40, sec. 4, 20 Stat. 113, 114; 2 U. S. Comp. St. 1901, p. 1398, sec. 2296; Act May 20, 1862, c. 75, sec. 4, 12 Stat. 393) from any 'debt contracted' previous to their acquisition does not exempt them from liabilities for the torts of the entrymen previously perpetrated." In the opinion it is said:

"Congress exempted the lands which it practically donated to the entryman under the homestead and timber culture acts from any debt contracted previously by the patentees, but from no other liabilities. The terms 'liability incurred' and 'debt contracted' are equally familiar. When the subject of liabilities is brought to the attention, they occur to the mind with equal readiness, and when contrasted their significations are clear and definite. If an act provided that lands should be exempt from every liability incurred, there could be no doubt that they would be free from all liabilities. * * * These terms and their meanings could not have failed to occur to those who drafted, or to those who passed, the acts of congress under consideration, and their rejection of the familiar and broad term 'liability incurred' and their selection and adoption of the limited expression 'debt contracted' is a demonstration that they had no purpose to exempt the lands they gave from liability for the wrongs which the patentees might have perpetrated, and that they in-

tended to free it from the debts which sprang from their agreements only."

This construction of the law has been cited with approval by the supreme court of the United States in *Doran v. Kennedy,* 237 U. S. 362. In *Best v. Zutavern,* 53 Neb. 604, "A judgment for alimony in favor of a wife, rendered in an action for divorce, is a lien on the family homestead, the title whereof is in the husband." But that point is perhaps not important in this case, because the homestead under our state law does not exceed 160 acres of land, and the record in this case shows that the quarter section of land on which the plaintiff resides was not included in this levy. But the decision in that case and other decisions of this court are that the liability for alimony is not a contract liability. And it follows that a government homestead is not exempt from a judgment for alimony of a divorced wife. It is said in the brief that, as this judgment was rendered before the defendant therein acquired title to the land levied upon, the judgment could not then have been made a lien upon the land, but no reason is suggested why after acquired property not exempt may not become liable when acquired.

The defendant also relies upon a former judgment of the district court enjoining a levy to satisfy this claim as a bar in this case. It appears that an attempt was made to levy a former execution upon the improvements, consisting of a dwelling house and other improvements of this plaintiff upon that part of the land which was occupied as a home. An action was begun in the district court to enjoin the levy and sale of those improvements. The petition alleged that the improvements in question were so constructed and placed that they had become and were a part of the real estate, and that the defendant therein, the plaintiff in this case, had not yet made his final proof under the homestead laws of the United States, so that as real estate the improvements were not subject to levy. A temporary injunction was allowed, which was afterwards made permanent. The court found that the allegations

of the petition were true. It does not appear from the pleadings and proof in this case that the matter determined in the former action is essentially involved in this proceeding. The trial court was therefore right in not considering the former decree as a bar in this case.

It follows that the land levied upon herein is liable for the satisfaction of the judgment, and the judgment of the district court is

AFFIRMED.

HAMER, J., dissents as to the third paragraph of the syllabus, on the ground that the point therein determined is not involved in this case.

EDWARD IRWIN, APPELLEE, v. JETTER BREWING COMPANY, APPELLANT.

FILED JUNE 2, 1917. No. 19257.

1. **Judgment:** SATISFACTION. Where the plaintiff has recovered more than one judgment for the same injury against persons jointly and severally liable to him therefor, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause.
2. **Appeal:** PLEA IN ABATEMENT. This court has jurisdiction to entertain a plea in abatement by reason of matters happening after the appeal to this court has been perfected.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Remanded, with directions.*

Mahoney & Kennedy and *Yale C. Holland,* for appellant.

William R. Patrick and *C. J. Southard, contra.*

CORNISH, J.

The plaintiff in this action recovered judgment against Gould & Son, contractors, for injuries received in an accident in the construction of a building for defendant. Afterwards he commenced this action against defendant, owner

of the real estate, for the same injury, on the statutory ground making the owner jointly and severally liable with the contractor for injuries received, and recovered the judgment appealed from. Pending this appeal, the plaintiff accepted payment of his judgment against Gould & Son, in full satisfaction thereof, as shown by the records in that case. Defendant made a showing of these facts and the further fact that it had commenced action in equity for the cancelation of the judgment in this action. It asked that the hearing be delayed until the hearing of the action in equity referred to, which it alleged would render further hearing of the action in this court unnecessary. This court entered the order that this action would be heard when reached, without prejudice, however, to the right of the defendant to a showing upon the final hearing that the damages had been paid.

Not disputing these facts, plaintiff contends that defendant's remedy is by injunction, and that this court has not jurisdiction to entertain this sort of a plea. He argues that judgment in this cause is subject only to reduction in the amount of the other judgment, and that in any event the defendant must pay the costs of this action.

We are of opinion that it is among the inherent powers of a court having jurisdiction of a cause on appeal to entertain a plea in abatement by reason of matters happening after the appeal has been perfected. *Shold v. Van Treeck,* 88 Neb. 80. Why should further hearings be had when indisputably the action itself is at an end and the controversy should cease?

The satisfaction by the plaintiff of the judgment obtained by him against Gould & Son operates as a satisfaction of the judgment obtained in this action, except costs up to the time that the judgment was satisfied. The rule is universal in this country that, where a party is injured by joint tort-feasors, or persons jointly and severally liable for the wrong, he may at his election sue separately one or both, and may recover judgment against each, but he is entitled to but one satisfaction for the injury done him.

Bryant v. Reed, 34 Neb. 720; *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393; *Sessions v. Johnson*, 95 U. S. 347; 2 Black, Judgments (2d ed.) secs. 780, 782.

This cause is remanded to the district court, with directions that the same be dismissed on payment by defendant of the costs made up to April 29, 1916.

JUDGMENT ACCORDINGLY.

WILLIAM DUNN ET AL., APPELLEES, v. EVA ELLIOTT ET AL., APPELLANTS.

FILED JUNE 2, 1917. No. 19488.

1. **Wills: CONSTRUCTION: AMBIGUITY: EXTRINSIC EVIDENCE.** The bequeathing clause in the testator's will reads as follows: "I give and bequeath to my wife—Mary Etta Woodard all my personal property of whatever kind and nature, and our land, more particularly described as follows: (describing land) to be used by my said wife, Mary Etta Woodard during her natural life and under her complete control and at her death to be distributed between our heirs according to law." There were no children, the issue of the marriage of the testator and wife, to whom the words "our heirs" could refer. *Held*, that an ambiguity arises permitting parol or extrinsic evidence for the purpose of assisting the court in ascertaining its meaning.
2. ———: ———: **DISTRIBUTION.** Evidence examined, and *held* that, under the provisions of the will, the land should be divided one-half amongst the heirs of the testator and one-half amongst the heirs of his wife.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

McGilton, Gaines & Smith and *A. L. Tidd*, for appellants.

Fawcett & Mockett, T. S. Allen and *H. L. Wilson, contra.*

CORNISH, J.

The questions presented in this case involve the construction of a will, and also the effect of the decree of the probate court in distributing the property of the estate.

The paragraph of the will in controversy reads as follows: "Second. I give and bequeath to my wife—Mary Etta Woodard all my personal property of whatever kind and nature, and our land, more particularly described as follows: (describing land) to be used by my said wife, Mary Etta Woodard during her natural life and under her complete control and at her death to be distributed between our heirs according to law."

Wills are to be construed according to the reasonable intent of the testator, as evidenced by the language of the will, giving to the words used their ordinary meaning. Where the language of the will is doubtful or ambiguous, parol or extrinsic evidence is admissible for the purpose of assisting the court in ascertaining the real meaning of the language used. Giving to the language above quoted its natural and ordinary import, the pronoun "our" would be taken to refer to the testator and his wife. The defendants contend that it means as if it read "my." The difficulty with this interpretation is that earlier in the paragraph the words "our land" are used, and in the preceding line the words "my personal property." It is unreasonable to suppose that in the same sentence one would use the words "my" and "our," except as distinguishing words.

It happens in this case that a latent ambiguity arises in this: There was no issue of the marriage of the testator and his wife to whom the words "our heirs" can refer. Both the testator and his wife, however, had children by former marriages; the husband two, the wife three.

It is contended by defendants that a distribution "according to law," as the will states, would be to give the land to the testator's children; that the courts will not, unless its language requires it, give a construction to a will which will have the effect of disinheriting or partly disinheriting the children of the blood of the testator, and they further argue, as above stated, that the pronoun "our" should be taken to mean "my." On the other hand, it is contended by plaintiffs that the plural pronoun "our"

means husband and wife; that the heirs referred to are two sets of heirs, those of the husband and those of the wife, as indicated by the use of the word "between," which usually refers to only two; that the signification of the words "according to law" is that the land shall be divided into two parts, one part going to his wife's, the other to the testator's heirs.

Neither of these constructions is without reason. A case is presented where it is proper to take evidence extrinsic to the will. Such evidence was taken. From this evidence it appears that the testator himself interpreted the will substantially in accordance with the view of the plaintiffs. At the time of its execution, when inquiry was made why one of his children, who was at the house, had not appeared, he remarked that "he guessed she didn't like it, but he couldn't help it; he wanted them all satisfied."

It appears that the land was the joint accumulation of husband and wife, and that they had lived together for 30 years.

From the language of the will, in the light of the evidence adduced, we are of opinion that the construction, contended for by the plaintiffs and given by the trial court, is right.

It appears that the probate court, in its decree distributing the property of the estate, decreed that the real estate in controversy upon the death of the testator's wife, Mary Etta Woodard, should descend to the children of the testator. While the county court has power to construe a will, in so far as it may be necessary to do so to give proper directions to the executor or administrator with will annexed, and for their protection, it is not empowered to finally decide controversies between adverse claimants under a will involving title to real estate. *Youngson v. Bond,* 69 Neb. 356; *St. James Orphan Asylum v. Shelby,* 75 Neb. 591. By the terms of the will the real estate was not to be distributed until the death of the testator's wife. At the time of the decree of distribution the wife had not

yet died. The decree of the county court was not *res adjudicata* as between the parties to this action.

For the reasons shown in this opinion, the judgment of the trial court is

AFFIRMED.

MARY HLAVATY, APPELLEE, V. RHODA M. BLAIR, APPELLANT.

FILED JUNE 2, 1917. No. 19565.

1. **Fraud: MISLEADING REPRESENTATIONS.** Representations made by one party to a contract in such terms as would naturally lead the other party to suppose the existence of a certain state of facts, or representations which he knows have led the other party to suppose the existence of a certain state of facts, if made designedly and fraudulently, are as much fraudulent misrepresentations as if statements of untrue facts were made in express terms.
2. **Witnesses: COMPETENCY: TRANSACTION WITH DECEDENT.** A transaction or conversation within the meaning of section 7894, Rev. St. 1913, is an action participated in by witness and decedent and to which, if alive, decedent could testify of his personal knowledge.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

A. M. Post, for appellant.

C. Petrus Peterson and *R. W. De Voe, contra.*

CORNISH, J.

This is an action for rescission and reconveyance of lands exchanged, on the ground of false and fraudulent representations made by defendant's intestate as follows: That the land was free of all incumbrances; that the water rights appurtenant to the land had been paid in full, so that nothing was owing for water rights, or would be in the future; that the land was worth $150 an acre; and that he paid $9,000 for it. There was testimony of witnesses as to representations as follows: Mrs. R. W.

Holmes: "He (Mr. Blair) said he paid $150 an acre for it (the land), the water rights were paid, and she (Mrs. Hlavaty) wouldn't have to pay anything, (except) for what water she used during the year, and to pay the taxes." S. B. Iiams: "He insisted there was no bonded indebtedness and the water rights were paid for, I wanted to go out at that time, I wanted to start that evening, but he insisted his physical condition was such he could not and would not transact any business." Plaintiff, a native of Bohemia: "He did, he thought he did, I understood it was all paid for is what he told me, I don't need to pay nothing at all, just the water I used was all."

While defendant admits the land was represented as worth $150 an acre and free from liens, she denies the making of representations in the language sworn to. We are of opinion that the evidence shows that representations, substantially as above quoted, were made. The facts are that, within a month after the trade was made, plaintiff discovered that there were outstanding and unpaid bonds of the Otero Irrigation District, which included this 80 acres, in the sum of $777,500, with an assessed acreage of the district of 19,365 acres; that Blair had paid for the land $6,500, but had put improvements thereon, making the investment amount to about $9,000. The case turns upon the question whether, such being the representations and the facts, plaintiff was entitled to a rescission; the representations being made to induce the trade, and plaintiff having relied upon them to her injury.

It is defendant's contention that the water rights were, in fact, paid for by the bonds issued; that the bonds being municipal securities, like courthouse bonds, not a specific lien or incumbrance upon the land, the statements were in no event untrue or fraudulent. We are of opinion that this contention is erroneous. Even though we eliminate the statements sworn to by the witness Iiams, as to there being no bonded indebtedness, the natural import of the representations made would lead the plaintiff, or other ordinary person, to believe that she was getting the water

rights appurtenant to the land free of all expense, direct or indirect, to her, except what would be necessary for annual dues for maintenance, according to water used. In short the cost of water rights, though evidenced by bonds, and not a specific lien upon the land, was not, in fact, paid for. Each acre of the land had yet to pay its proportionate share as the money would be collected through taxation. The defendant's intestate could not have been ignorant of the fact that plaintiff wished to know how the value of the land she was getting was affected by the water rights appurtenant thereto, and that she was relying upon him for information. Plaintiff, under the circumstances shown by the evidence, was not bound to make an independent investigation. Even if the representations had been limited to a statement that there were no liens or incumbrances upon the land, as contended by defendant, yet, if at the time plaintiff was inquiring about the water rights appurtenant to the land she used language indicating to him that she understood that anything, still to be paid on account of the original cost of the water right, would be an incumbrance, then such a representation upon his part, tending as he would know, to mislead her, would amount to fraud and misrepresentation. 1 Bigelow, Law of Fraud, p. 5; 2 Pomeroy, Equity Jurisprudence (3d ed.) secs. 808, 873. But the representations went farther than a mere statement as to liens and incumbrances.

It is urged that there is no competent evidence of *reliance* upon any statement of deceased. It is said: "Reliance in this case upon the alleged false statement involved a mental process known to appellee alone." This comes near being true in any case, and by this argument it might follow that death of one, closing the mouth of both parties to the transaction, would prevent rescission for fraud in all cases. The general test is that such witnesses may testify to matters where the decedent, if alive, could not testify of his personal knowledge to the contrary. Certainly a state of mind, independent of the communication had between the witness and the deceased, is not open

to the objection. Such would be testimony that she made no inquiries of other persons touching the character of the land or water rights appurtenant thereto; that, outside of anything Mr. Blair may have said to her, she did not know there were any bonds against the irrigation district where the land was situated; and that she believed any statements made by Mr. Blair to be true.

We are of opinion that the evidence is ample to show that she traded for the land, relying upon her belief that there would be no charge, directly or indirectly, for water rights.

AFFIRMED.

STATE, EX REL. HELEN JENSEN, APPELLEE, V. ROY TURNQUIST, APPELLANT.

FILED JUNE 2, 1917. No. 19840.

Witnesses: IMPEACHMENT: EXCLUSION OF EVIDENCE. It is error to exclude evidence which has a tendency to impeach a witness on a material fact sworn to by him, the proper foundation having been laid therefor.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Ringer & Bednar, for appellant.

M. O. Cunningham, contra.

CORNISH, J.

This is an appeal from a judgment in a bastardy proceeding in which the defendant was found to be the father of the illegitimate child of relator, Helen Jensen. As stated in the brief of counsel for complainant, "the evidence is not as overwhelming in favor of the complainant" as one would like. He adds, however, that in cases of this kind it is often difficult to secure evidence which is altogether convincing and satisfactory.

The verdict rests upon the uncorroborated testimony of the complaining witness. Her mother testified that, while she knew her daughter went out with the defendant the first week in June, and that he brought her home in an automobile, she herself never met or saw him until August 21. Some of the testimony of the complaining witness is not consistent with ordinary experience in such cases. She testified to having had intercourse with the defendant the first evening they met; that she did not inform him of the situation until about four months afterwards. She testified to only the one act during the necessary period in which he might have become the father of the child. The defendant denied any acquaintance with her at the time.

Complainant testified that on September 27, 1915, when she told defendant of her condition, he procured a medicine, in the form of pills, which he gave to her for the purpose of producing a miscarriage. She testified that afterwards, early in January, she took the pills and they made her sick. In corroboration of this testimony, her mother testified that she discovered the medicine in November, when her daughter was sick from taking it. On cross-examination she was asked if in January she had not had a conversation with the parents of defendant in which she stated that she had purchased medicine for her daughter, which, when taken, had made her daughter sick. She denied making such statement. Afterwards, when the impeaching questions were put to defendant's parents, who were called as witnesses, the court sustained objections to the questions. This is complained of as error.

We are of opinion that the court did err in sustaining these objections. The evidence showing but one batch of medicine, secured and used, and but one sickness, this evidence would be proper for the jury to consider, in considering whether or not it was the defendant or the mother who had procured the medicine which made the complaining witness sick; and, if it was a circumstance bearing

upon that issue, it would be important testimony for purposes of impeachment.

We do not pass upon the other errors complained of by defendant. We are of opinion that the error above noted, under all the circumstances, was prejudicial to defendant, and that the judgment of the trial court should be reversed and the cause remanded.

REVERSED.

ALBRO L. HODGE v. STATE OF NEBRASKA.

FILED JUNE 2, 1917. No. 19943.

1. **Criminal Law:** TRIAL: INSTRUCTIONS: "REASONABLE DOUBT:" PREJUDICIAL ERROR. In a criminal prosecution an instruction contained the following language: "You are instructed that, concerning the term 'reasonable doubt' as the same has hereinbefore been used, you are instructed that as a matter of law the doubt which a juror is allowed to retain on his own mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And a juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from that established by the evidence." This language has heretofore been disapproved by this court, and under the circumstances in the present case it is deemed prejudicially erroneous.

2. ———: RECEIVING PROPERTY WITH UNLAWFUL INTENT: SUFFICIENCY OF EVIDENCE. The evidence examined and discussed in the opinion, and *held* insufficient to support a judgment of conviction of the crime charged in the information.

ERROR to the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

J. E. Porter and *Earl McDowell,* for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe, contra.*

DEAN, J.

Albro L. Hodge, plaintiff in error, hereinafter called defendant, a resident of Dawes county, was informed against by the state upon two counts, the first count charging him with the theft of a bull in Sioux county on August 12, 1916, the property of John E. Shaw, resident in that county. The second count charged him with unlawfully and feloniously receiving the bull with the unlawful and felonious intent of defrauding the owner of his property. On the first count defendant was acquitted. On the second count he was found guilty and was sentenced to serve an indeterminate period of penal servitude of from one to ten years. He brought the case here for review.

Defendant argues that his conviction is not supported by the evidence, and that for this reason, and for other errors as well that appear in the record, the judgment should be reversed.

The record shows that defendant is a farmer and ranchman, engaged in the occupation of buying and selling cattle on the local market, and in shipping stock to Omaha in connection with his stock ranch in Sioux county and his farm in Dawes county. On August 12, 1916, defendant shipped a car-load of cattle from Glen station, in Sioux county, to South Omaha. He directed his son and a hired man to round up a load of cattle from his ranch and take them to the railroad stock-yards at Glen, distant about two miles, for the purpose of loading for shipment. Defendant took no part in the selection of the cattle that were to be shipped, nor in loading them, but only in a general way directed his son and the employee as to the grade of cattle and the sort that he wanted to ship. The cattle so selected for shipment were not recently before the shipment seen by defendant until the morning of August 12, at about the time they were loaded. While the stock was being loaded by defendant's son and the hired man, defendant was engaged in the cattle car putting up a small partition for a blind cow that was included in the shipment that it might be protected from injury by the

other cattle. Defendant was not at home on the late afternoon and night of August 11, but was at the home of George Lakin, a neighbor, at whose place, Mr. Lakin and his wife testified, he arrived at about 6 or 7 o'clock in the evening, where he remained through the evening and until the next morning shortly after breakfast, when he left the Lakin residence. Defendant testified that he left his own ranch at about 4 o'clock in the afternoon of the 11th, going directly to the Lakin residence, and from there after breakfast the next morning to his ranch, where he gave general directions about the shipment. Defendant testified that while the boys were getting the cattle together he brought the blind cow to the stock-shipping yard at the station, and from there he went to the post office, where he got his grip, and returned to the way-car of the stock train. Shortly after 8 o'clock the shipment, accompanied by defendant, was on its way to the Omaha market, arriving there on August 14.

Four bulls were in the shipment that he sold in the open market at the South Omaha Exchange. When the cattle were inspected for brands, it was found that one bull in the consignment had the brand "VA" on its left side, that being the brand of John Howard, a resident of Sioux county, and also a brand "V" on its left hip. Defendant testified that he returned to his home without any knowledge that the branded bull was held up by the stock exchange for investigation as to ownership, and that when his attention was first called to the brands on the animal in question he believed it to be an animal he had purchased from Al Smith, a long-time resident of Sioux county, and a cattle dealer there. He testified positively that he did not know of the presence in his shipment of the animal in question until after his return home, when he received information to that effect from the stock exchange.

Al Smith, the cattle dealer, testified that he handled between 600 and 700 head of cattle in the 12 months immediately preceding the trial, and that in the summer of

1916 he sold to the defendant a mixed herd of cattle, in which there were four bulls, three red ones and a white faced one, and that the cattle were delivered at defendant's ranch in Sioux county. He said that he had no recollection about the brands on any of the cattle that he sold to defendant. The testimony conflicts in regard to the identity of the animal alleged to have been unlawfully received by defendant on August 12. The brand inspector testified that the animal that was held up out of defendant's shipment had a brand "VA" on the left side, and also a brand "V" on the left hip. When he was asked about the condition of the ears of the animal, he said he never noticed anything peculiar about them. John Howard, the former owner of the bull, testified that the animal he sold to Mr. Shaw had a white face, and that its ears were "either frozen off, or very small ears. I remember I intended to ear-mark him when I got him, and I didn't do it because his ears were very short or frozen off," and that he "figured part of them were gone," and that he was under the impression that the bull he sold to Mr. Shaw had a churn dasher on the jaw, and that he so testified at the preliminary. Mr. Howard, was then asked this question that referred to his testimony at the preliminary: "Q. And you said that was Sides' bull brand? A. I did, and I think yet it was on there. Q. Which jaw? A. The left jaw." It will be borne in mind that Mr. Shaw testified that there were no brands on the animal that he knew of except the "VA" brand on the left side. He also definitely fixed the morning of August 12 as the time when he missed his bull and it disappeared.

Defendant argues that the court erred in giving instruction No. 10, which follows: "You are instructed that, concerning the term 'reasonable doubt' as the same has hereinbefore been used, you are instructed that as a matter of law the doubt which a juror is allowed to retain on his mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt pro-

duced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. And a juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of facts differing from that established by the evidence. The jury are instructed that if, after a careful and impartial consideration of all of the evidence in the case, they can say that they feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then the jury are satisfied beyond a reasonable doubt." With respect to this instruction, the state in its brief makes this admission: "The first three sentences of the above instruction have been criticized by this court." But it argues that the instruction taken as a whole should not be held to be prejudicially erroneous. The objectionable portion of this instruction may be recognized as having been used in the noted anarchist trial. We again express our disapproval of its use. In the present case it was prejudicial to the defendant. It has been repeatedly held by this court so prejudicially erroneous as to require a reversal, and we so consider its use in the present case. *Brown v. State,* 88 Neb. 411; *Flege v. State,* 90 Neb. 390.

Defendant argues that the court erred in refusing to permit him to file a supplementary motion that was offered in apt time for a new trial "setting forth grounds of newly discovered evidence, and for time to procure the the necessary evidence." Defendant's offer was made to prove by reputable witnesses that John H. Howard after the trial told defendant in the presence of several witnesses that he, Mr. Howard, was "satisfied that the bull I (defendant) sold at South Omaha and for which I (defendant) had been convicted for receiving same knowing it to be stolen was not the bull he (Howard) sold to John E. Shaw." In view of the conflicting testimony on this material point, we believe the court erred in refusing to give defendant a reasonable time to permit the showing

to be made. The record shows that an application supported by affidavit was made to the court by defendant for time to make this showing immediately upon discovery of the fact.

Defendant insists that he was prejudiced by what he terms misconduct of the prosecuting attorney in his closing argument. But the record on this point shows, as the learned trial judge certified, that defendant's counsel promptly took exception to the remarks of the county attorney, and the court at the time directed that official to confine his argument to the testimony, and at the same time admonished the jury to disregard the statement of which the defendant complained. It sometimes happens that an attorney may, in the heat of argument, by use of statements that are not warranted by the record, inject into the mind of the jury a poison that cannot be neutralized by any admonition that the judge may give. And this court has held that such conduct may work a reversal in a case that is otherwise without prejudicial error. *Powers v. State,* 75 Neb. 226.

We do not reverse the present case on the ground of misconduct of the county attorney, but merely refer to it for the reason that the complaint is so often made that we have deemed it well to again express our disapproval of such conduct.

We have not discussed all of the testimony that we find in the voluminous record before us, but deem it sufficient to say that the testimony fails to connect the defendant with the crime with which he is charged.

For the errors appearing in the record, the case is

REVERSED.

SEDGWICK, J. not sitting.

FRANK J. KENNEY, APPELLEE, V. VILLAGE OF DORCHESTER ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19509.

Municipal Corporations: USE OF STREETS. The right of a private party to occupy part of a public street in front of his place of business must yield to public necessity or convenience, and ordinarily the question of public necessity or convenience is for the governing body of the municipality, but such body cannot act arbitrarily and deny to one citizen privileges which it grants to another under like conditions.

APPEAL from the district court for Saline county: LESLIE G. HURD, JUDGE. *Affirmed.*

George H. Hastings, Roland F. Ireland and *Robert R. Hastings,* for appellants.

T. J. Doyle, contra.

MORRISSEY, C. J.

Plaintiff, the owner of two business lots located on the main street of the village of Dorchester, installed modern gasoline apparatus, consisting of a tank, buried beneath the surface of the ground, and a pump connected therewith, in the space between the sidewalk and the graded part of the street, in front of his place of business. Growing in the park space is a row of thrifty trees, and the pump was set in line with and between these trees. A section of hose extends from the pump, by which gasoline is delivered to automobile drivers who drive up to the curb, or, perhaps it were better to say, to the place where a curb ought to be. On the same street, but a block and a half distant from plaintiff's place of business, a competitor, with the sanction of the village board, installed and maintains similar apparatus in a like position. The village board adopted a resolution directing plaintiff to remove his tank and pump, whereupon he sued out a writ of injunction, which, after hearing, was made perpetual by the

district court, from which order the village prosecutes this appeal.

Five assignments of error are set out. One of which is: "That the decree of the court is contrary to law and the evidence." Appellants' brief says: "The errors relied upon are so closely and intimately connected and interwoven that we deem it best to consider them as a whole rather than to discuss each separately." We will do likewise, as the assignment quoted covers the whole matter. Copious excerpts from the statutes are set out in the brief to show that the village authorities have control and jurisdiction of the streets of the village, with the right to remove obstructions from the sidewalks, curbstones, gutters, and cross-walks, to require and regulate the placing and protection of trees, and in fact to maintain general supervision of the streets. Of course, there is no room for question as to these general provisions, but in the instant case the record discloses that Dorchester is a village of about 600 population; that the main street, where the pump and tank are situated, is 100 feet wide. There is no congestion of the street, or any necessity shown for the removal of the tank and pump. The sidewalk extends eight feet from the lot line, and the distance from the outer edge of the sidewalk to the graded part of the street, or the point where a gutter may be built, is four feet. The row of trees heretofore mentioned is growing in the intervening space. The pump complained of is between the trees, and the village is not using, has not used, and, so far as the record shows, has no intention of using this space. It is not disputed that the equipment is of the very latest and best pattern, and such as is in use in other cities in the state; that it serves the convenience of a great number of persons living within the village; and that it is not dangerous or unsightly. In *Chapman v. City of Lincoln,* 84 Neb. 534, it is held: "It is no defense to a party who is being proceeded against by a city for unlawfully obstructing a sidewalk that others are obstructing the walks in like manner." There the plaintiffs were occupy-

ing a sidewalk space in direct violation of an ordinance of the city forbidding such occupancy by any person. In the instant case there is no such ordinance, but, on the contrary, it appears that, with the sanction of the village board, plaintiff's competitor is making like use of street space. The village board having granted plaintiff's competitor permission to install and maintain similar apparatus under like conditions, it ought not to arbitrarily deny the same privilege to plaintiff.

"Although the granting or refusing of a license is in a large measure discretionary, the acting authorities are not vested with personal or arbitrary power, but are subject to the control of the courts, when it appears that they have acted arbitrarily in the premises, and have thus abused the public trust reposed in them." 3 McQuillin, Municipal Corporations, sec. 1005.

The judgment is affirmed, but it will not be so construed as to deny the village board control of the whole situation by the enactment of a suitable ordinance which will apply to all persons similarly situated.

AFFIRMED.

STATE, EX REL. NORRIS BROWN, ATTORNEY GENERAL, APPELLEE, V. WAYNE COUNTY AGRICULTURAL SOCIETY, APPELLEE; JAMES BRITTON ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19544.

Attorney and Client: FEES: SERVICES BENEFICIAL TO STOCKHOLDERS. Where by the services of attorneys, duly retained by trustees appointed by the court for the benefit of the creditors and stockholders of a corporation whose charter has lapsed, property is preserved, their fees should be paid from the fund in the hands of the court.

APPEAL from the district court for Wayne county: ANDREW R. OLESON, JUDGE. *Affirmed in part, and reversed in part, with directions.*

William L. Dowling, for appellants.

A. R. Davis, contra.

MORRISSEY, C. J.

Appeal from an order of the district court for Wayne county.

In 1885 there was organized, under the general incorporation laws of the state, the Wayne County Agricultural Society. Among other property acquired was a tract of land lying adjacent to the city of Wayne. From 1885 to 1901, inclusive, the society held fairs, but after the latter date ceased to do so. Stockholders' meetings were not regularly held. Many of the stockholders left the county, others transferred their stock to parties who failed to have the transfers noted on the books of the company, and the ownership of much of the stock was unknown. Thus matters ran until June, 1905, when certain resident stockholders filed, with the persons who had theretofore acted as president and secretary, a request in writing that a meeting of the stockholders be called "for the purpose of perpetuating said organization or dissolving and disbanding the same." Pursuant to this request, a meeting of the stockholders was held July 7, 1905, at which meeting a resolution was adopted by a stock vote of 148½ shares to 33 shares, appointing a committee of three, "with full power and authority to dissolve or perpetuate this organization, to collect all moneys belonging to said organization, to bring such suit or suits as may be necessary, either in law or equity, to make settlements in regard to such property, and to employ counsel, who may be one of their number, and agree upon his compensation, to have full authority necessary to settle up such organization, to wind it up or extend it as their judgment seems best."

Pursuant to this resolution, a committee was appointed, which determined that it was to the interest of the stockholders to dissolve the corporation, and that these appellants should be engaged as attorneys, to receive as compensation a sum equal to one-half the value of whatever

property the stockholders might receive as a result of the proceedings. The society was subsequently dissolved by regular proceedings, and three trustees were appointed to take charge of the property for the benefit of the creditors and stockholders. Subsequently an action was brought on behalf of the county against the trustees and other persons claiming under them to procure a decree which would vest the title to the property in the county of Wayne. This suit was successfully defended by the appellants, and by decree of this court the title to the property was vested in the trustees. Since the entry of said decree, in 1912, the property has been sold, the debts paid, and the trustees filed their final report. On the coming in of the report of the trustees, appellants filed their claim and asked for its allowance.

The claim is not based alone on the contract made with the committee of stockholders, whereby appellants were to receive one-half of any amount saved as a result of their services, but it seems to rest also on a contract made by the trustees, under date of May 20, 1907, whereby, in the name of the society, they contracted to pay appellants a reasonable compensation. The creditors of the association have been paid in full, and no objection is made to the allowance of the claim by any stockholder or other person having an interest in the fund, but the trial judge took the view that throughout the litigation, which ran more than ten years, the appellants were not in the employ of the society, but of the individual stockholders with whom they dealt, and that they must look to these stockholders, and not to the society, for their compensation.

Regardless of the character of the litigation or the form of the action that was prosecuted, the services rendered inured to the benefit of every share of stock. The litigation was successfully concluded and a large amount of property was saved to the society. Each share of stock has been enhanced by appellants' services. The failure of each and every stockholder to object to the allowance of the claim, or even suggest that it is too high, may be taken

as some evidence of its fairness and of a desire on the part of all parties interested that it be paid. On the record before us it appears that the district court erred in disallowing the claim for attorneys' fees.

There is a further item of $200, claimed by the appellant Britton for services as secretary to the society. This was also disallowed by the court, and we think properly so. As to this item, the judgment is affirmed, but as to the item of attorneys' fees, the judgment is reversed, with directions to the district court to enter a judgment in conformity with this opinion.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., not sitting.

WILLIAM D. JORDAN V. STATE OF NEBRASKA.

FILED JULY 3, 1917. No. 19655.

1. **Criminal Law**: JURY: SUMMONING BYSTANDERS: FAILURE TO OBJECT. When upon the trial of a felony case the jury panel is exhausted and the court directs the sheriff, or coroner, "to summon from any of the bystanders so many good and lawful men as necessary to complete the same," objection to such order and to a juror so drawn not having been made until after verdict, it will be held error without prejudice.

2. ———: EXCLUSION OF WITNESSES. When the sheriff is a witness for the state, it is not ordinarily error for the court to refuse to exclude him from the courtroom during the examination of other witnesses.

3. ———: WITNESSES: LEADING QUESTIONS. The manner in which a witness shall be examined is a matter over which the trial court has a large discretion, but leading questions, which suggest to the witness the answer desired, should not ordinarily be allowed. If, however, it appears that the questions and answers were not of such a nature as to prejudice the defendant, the error will not require a reversal.

4. **Instruction** set out in the opinion *held* free from error of which defendant may complain.

5. **Criminal Law**: ARGUMENT. A prosecuting attorney ought not to appeal to the prejudice of a jury, or ask that they return a ver-

dict in response to public sentiment, but, upon the record in the instant case, the address of the county attorney is not so prejudicial as to require a reversal of the judgment.

ERROR to the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

L. W. Colby, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe, contra.*

MORRISSEY, C. J.

Defendant was convicted in the district court for Scott's Bluff county of murder in the first degree. A sentence of life imprisonment was imposed, and he brings the case here on error proceedings.

At the request of the county attorney, another member of the Scott's Bluff county bar was appointed to assist in conducting the prosecution. Counsel for defendant filed objections to this appointment. The objections were overruled, and are urged again here. These objections were based upon the allegations that this attorney had appeared for the heirs of the deceased, other than the widow, in the matter of the probate of the estate of the deceased, and was therefore disqualified under section 5601, Rev. St. 1913. The testimony taken on the hearing of these objections is preserved in the bill of exceptions. It shows that, during the lifetime of the deceased, the attorney had represented deceased on one or two occasions; and that immediately following the homicide he, together with other citizens, went to the scene of the tragedy and made such investigation as any public-spirited citizen might make under the circumstances. Soon thereafter, at the request of a sister of the deceased, he prepared a petition for her appointment as administratrix of the deceased's estate, and this was filed in the county court. Before a hearing was had on the petition, the county attorney requested him to assist in the prosecution. He thereupon filed a withdrawal of his appearance in the county court, and was not

thereafter interested in the estate proceedings. He testified that no agreement had been made with him by any of deceased's heirs as to attorney's fees in the estate matter; that he never was paid for preparing the petition, and expected no pay therefor. It is also shown that he had no private employment from any of the deceased's family; that his employment came solely through the county attorney; and that he was not interested in any litigation based upon the same state of facts upon which the prosecution was based. On this showing the district court did not err in overruling the objections.

Counsel for defendant also complain that they were denied an opportunity to interview witnesses who had been subpœnaed by the state. The court gave them a hearing upon that complaint, and made an order permitting them to interview the state's witnesses, leaving it optional, however, with the witnesses whether they should submit to such an interview. The order made by the court fully protected the defendant in any rights he had, and he is in no position to complain of the ruling of the court thereon.

Early in the trial defendant filed an objection to the sheriff acting in his official capacity, alleging that he was prejudiced against the defendant. Later, however, defendant undertook to withdraw his objection, but by the permission of the court the coroner proceeded to exercise the functions of the sheriff, and the clerk thereafter issued an alias venire for jurors, and the same was served on the coroner's deputy or agent without objection from the defendant. The examination of jurors proceeded until the state had exhausted or waived its peremptory challenges, and the defendant exercised his last peremptory challenge, and, the jury being still incomplete, the court ordered the coroner "to summon from any of the bystanders so many good and lawful men as necessary to complete the same," whereupon a bystander was called, examined, passed for cause, sworn as a juror, and sat upon the trial of the case. It is now urged that the order of the court to the coroner is absolutely void, and that the person so summoned was

incompetent and disqualified to serve upon the jury. This contention is based upon the language of section 8143, Rev. St. 1913, wherein it is provided that, under such circumstances as existed at the time, the court may order the sheriff or coroner "to summon without delay good and lawful men, having the qualifications of jurors." It is said that the order made was erroneous because it directed the coroner to summon jurors from "the bystanders." The statute does not forbid the selection of bystanders, nor does it say that they shall be selected from the body of the county, but merely provides that those selected shall have the qualifications of jurors. Defendant made no objection at the time, nor is any complaint made against the character or conduct of the juror so summoned. While perhaps the order ought to have been in the language of the statute, no objection was made at the time and no prejudice is shown. In the absence of such showing, it will be treated as error without prejudice.

Defendant requested that witnesses for the state be excluded from the courtroom during the trial. This request was granted, with the exception of the sheriff, who was a witness. As to him the court refused the request unless defendant file an affidavit of prejudice. This was not done, and the court, in the exercise of sound legal discretion, refused to exclude him; he being an officer of the court. This was not an abuse of discretion.

It is also urged that the county attorney, in his opening statement of the case to the jury, made remarks which were not sustained by the evidence introduced on the trial and were prejudicial to the defendant. A number of immaterial matters were mentioned on which evidence was not offered, or, if offered, was excluded, but we find no misstatements of a prejudicial nature. The excerpts quoted in defendant's brief do not contain any matter that would tend to unduly prejudice the jury against the defendant. For the most part the statement merely pointed out what the county attorney expected to dev op by the evidence, except that now and then he may have become argumentative.

This would have been more proper after the evidence had been introduced, but we find nothing that could have worked to defendant's serious disadvantage. As to that part which is most objectionable, no objection was made by defendant's counsel, nor was the court's attention called thereto.

Error is assigned because the court permitted counsel for the state to ask a number of leading questions. It is probably true that from time to time in making up this record of more than 1,000 pages there are some questions in such form as to suggest an affirmative answer. However, after a consideration of the questions to which our attention is directed by defendant's brief, we are of the opinion that the trial court was not guilty of an abuse of discretion in allowing the questions to be asked and answered. The manner in which the witnesses shall be examined is a matter over which the trial court has a very large discretion. *Edwards v. State,* 69 Neb. 386. But as to matters material to the issues, this method of examination ought to be carefully guarded against, and under some circumstances would be so prejudicial as to require a reversal.

It is also urged that witnesses were permitted to testify "to seeing footprints made by defendant on the soft, smooth ground the next morning, and to compare them with the tracks on the west side of the house supposed to have been made by the man who fired the fatal shot through the window, and to give the result of his opinion or comparison of such tracks to the jury." It is true that some of these questions, if singled out and taken alone, may be criticized, but, when the whole testimony is examined, and the description of defendant's shoes and the points on which the witnesses based their opinions are brought out fully, as they were before the jury, we can find no substantial error in the rulings of the court on the admissions of this testimony.

While defendant assigns as error the refusal of the court to give a number of requested instructions, he especially complains because his requested instruction No. 7

was not given. This instruction was given in substance by the court on its own motion, and therefore its refusal was not error.

While exceptions were taken to each of the instructions given by the court on its own motion, instruction No. 20 is the only one of which special criticism is made. It reads:

"Certain officers of the county of Scott's Bluff and other places have testified in this case on behalf of the state. You are instructed that under the law of this state, in weighing their testimony, greater care should be used, because of the natural and unavoidable tendency of such persons in procuring and stating evidence against the accused. But it does not follow that you are necessarily obliged to disregard their testimony."

Complaint is made of the concluding sentence. With the exception of this sentence, the instruction has heretofore been approved. *Preuit v. People,* 5 Neb. 377; *Kastner v. State,* 58 Neb. 767; *Shellenberger v. State,* 97 Neb. 498. In a discussion of the rule, in *Shellenberger v. State, supra,* it is said:

"Instructions of this nature are countenanced by the courts in behalf of a defendant, in order to call attention of the jury to the fact that the hunting instinct still exists, and that men whose duty it is to prosecute criminals sometimes allow their zeal, perhaps unconsciously, to color or bias their testimony in the endeavor to procure conviction. This is the only reason why such instructions are permitted." The clause of which complaint is made does not go too far in telling the jury that they are not necessarily bound to disregard the testimony of the county officers. Indeed, the instruction is too broad. It ought not to have been applied to the county officers generally.

The closing argument of the county attorney is criticized. There are statements therein relating to the expense of the trial which might better have been omitted. Perhaps also the conclusion he drew from some of the evidence, or his recollection of some of the evidence, was some-

what faulty. His reference to the public interest in the verdict and his suggestion of the verdict expected may well be criticized. A prosecuting officer ought not to appeal to the prejudice of a jury, or ask that they return a verdict in response to public sentiment, but, upon the record before us, we do not feel called upon to hold that his remarks were so prejudicial as to require a reversal of the judgment.

The assignments have been considered in the order followed in defendant's brief, and the sole question remaining is the insufficiency of the evidence to sustain the verdict.

Joseph E. Layton was a well-to-do farmer, who, about a year before his death, had married defendant's daughter. In April, 1915, defendant and his wife came from their home in California and took up their abode with Mr. and Mrs. Layton. On the night of June 11, the family, which consisted of Layton and his wife, and his wife's three-year old child by a former marriage, the defendant and his wife, and a servant girl, had supper about 8 o'clock in the evening. The women cleared the table while Layton remained seated, reading a newspaper, as was his custom. Defendant was in and about the house. The women, having finished their work, were seated on one side of the table, which was in a room used both as a dining room and kitchen, while Layton was on the other side, immediately in front of a window, with a lighted lamp on the table, when a shot was fired through the window. The bullet passed through Layton's head, killing him instantly. The theory of the state was that Jordan went outside of the house, and with a rifle shot and killed Layton, the motive being to obtain possession of his property, either for himself or for his daughter, Mrs. Layton. No evidence was offered in behalf of defendant. It would serve no useful purpose to discuss the evidence at length. It points conclusively to defendant's guilt, and the judgment is

AFFIRMED.

HAMER, J., not sitting.

JEANNETTE MCDIVITT, APPELLEE, V. MARIE E. BRONSON, APPELLANT.

FILED JULY 3, 1917. No. 19571.

Ejectment: RIGHT TO MAINTAIN. Where a building projects over and upon the land of an adjoining proprietor, the latter may maintain ejectment to recover possession of that portion of his property which is occupied by the encroaching structure.

APPEAL from the district court for Red Willow county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Eldred, Cordeal & McCarl, for appellant.

J. L. Rice, contra.

LETTON, J.

Defendant was the owner of two lots in the city of McCook, upon one of which her dwelling stood. She sold the other to plaintiff, who was intending to build. Plaintiff procured plans for the erection of a dwelling on the lot she purchased and let the contract for the erection of the house. She had the lot surveyed before beginning excavation for the foundation. It was then ascertained that a bay of defendant's house projected over and into the lot plaintiff had purchased. The portion which encroached was about 12 or 14 feet long and a little over 2 feet wide, exclusive of the eaves which projected about 2½ feet further. Plaintiff desired to use the strip upon which the house encroached as a driveway. She proposed to defendant that she (plaintiff) reconvey the lot and have a return of the purchase money. Plaintiff also negotiated with other parties with reference to the purchase of another lot. She also offered to accept $250 and reconvey the five-foot strip. The testimony tends to prove that defendant said she could not return the money and take the lot back because she had sent the money away. She declined to pay $250 for the strip. Plaintiff then proceeded with the construc-

tion of her house. She attempted to purchase a five-foot strip on the other side of the lot for a driveway, but the owner asked $400 for it and she did not purchase. Defendant has retained the full amount of the purchase money, and has never tendered or offered to pay or return to plaintiff any money from the time of the purchase until the present time. Plaintiff brought this action in ejectment to recover possession of the five-foot strip. It was disclosed at the trial that plaintiff was in possession of all the strip except that occupied by the encroachment of the dwelling. The cause was tried without the intervention of a jury. The court found that the building and eaves projected 4 feet 5 inches into plaintiff's lot, and that the plaintiff had sustained nominal damages of one cent, and rendered judgment of ouster. Defendant appeals.

The petition was the ordinary form in ejectment. The answer set up that the plaintiff knew of the encroachment when she purchased the lot and agreed that it might remain there, but there is absolutely no proof to support these allegations. The only assignment of error is that the judgment of the district court is contrary to law. Under this assignment two propositions are advanced; First, that it is essential to the action that plaintiff show that she has been ousted by the defendant; second, that ejectment will not lie for a portion of a building if the building will be so destroyed as to lose its identity.

In *Dale v. Hunneman*, 12 Neb. 221, the question whether it was necessary to prove ouster before an action of ejectment could be maintained was considered, and it was held that while this was essential at common law it was unnecessary in a modern action under the Code, and that all that is necessary to entitle the plaintiff to the action is that he has a legal estate in the premises, is entitled to possession of the same, and that the defendant unlawfully keeps him out of possession. *Bridenbaugh v. Bryant*, 79 Neb. 329.

As to the second point, only a small portion of defendant's dwelling projects into plaintiff's lot, which can be

be cut off and the main building left. The rule is that, where one encroaches by a building upon the land of another, ejectment is the proper remedy. *Butler v. Frontier Telephone Co.*, 186 N. Y. 486; *Wachstein v. Christopher*, 128 Ga. 229; *Johnson v. Minnesota Tribune Co.*, 91 Minn. 476; *Cromwell v. Hughes*, 144 Mich. 3. If it were not so, the adverse possession of the wrongdoer would ripen into a perfect title as against the owner. The finding of the court upon the facts in such an action is entitled to the same weight as the verdict of a jury. Defendant contends that plaintiff has mistaken her remedy, which is in equity. Plaintiff offered to rescind if defendant would return the money, but this offer was refused. She also offered to reconvey the strip to defendant for $250, which seems fair and reasonable, when the evidence shows that a like strip on the other side of the lot would have cost her $400. It would seem, therefore, that plaintiff has offered to do equity. Defendant has not pleaded an equitable defense, but has set up a legal defense which there is absolutely no evidence to sustain, and plaintiff is therefore entitled to judgment. It is unfortunate that this condition exists, but defendant seems to have brought it largely upon herself by her refusal to return the purchase money. It is to be hoped that even now an equitable adjustment can be made between these neighbors.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF CATHERINE E. CRAIG. ALVARADO W. CRAIG, ADMINISTRATOR, APPELLANT, V. DORIS L. WRIGHT, APPELLEE.

FILED JULY 3, 1917. No. 19600.

1. **Executors and Administrators: RIGHT OF APPEAL.** An administrator as such cannot appeal from the final order of distribution unless he is pecuniarily affected in his representative capacity. Rev. St. 1913, sec. 1498.

2. ———: DISTRIBUTION. "An administrator who undertakes, without an adjudication of heirship, to distribute funds in his hands as the residue of an estate administered by him, assumes the responsibility of making distribution to the proper persons." *Boales v. Ferguson*, 55 Neb. 565.

3. ———: ———: APPEAL. An administrator who, without having procured an order naming the distributees, distributes the proceeds of a judgment recovered by him for the death of intestate, cannot in his representative capacity appeal from the final order directing distribution to other persons.

APPEAL from the district court for Burt county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Sullivan, Rait & Thummel, for appellant.

Ellery H. Westerfield and *Raymond M. Crossman, contra.*

ROSE, J.

This is an appeal by Alvarado W. Craig, as administrator of the estate of Catherine E. Craig, deceased, from an order of the district court for Burt county dismissing his appeal from the final order of distribution entered by the county court. Catherine E. Craig was killed in a collision with a railroad train at a public crossing, and in an action for damages the administrator recovered a judgment for $10,000. The husband and three daughters of decedent survived her. She also left surviving her Doris L. Wright, a son by a former marriage. The county court found that Alvarado W. Craig, who had been appointed administrator, and his three daughters were the only heirs. Without an order of court the administrator distributed the proceeds of the judgment to himself and two of his daughters. At the time distribution was thus made, the petition of Wright for a vacation of the adjudication of heirship was pending in the county court. Wright also petitioned the county court for an order of distribution allowing the husband one-fourth and each of the four children of decedent three-sixteenths of the estate. On that basis the county court ordered distribution. The administrator as such ap-

pealed to the district court without bond, and he gave no appeal bond as an individual. Wright filed a motion in the district court to dismiss the appeal from the county court on the ground that the administrator had no right to appeal in his representative capacity and had failed to appeal as an individual. Rev. St. 1913, sec. 1427. The appeal was dismissed. From the district court's dismissal the administrator has appealed to this court.

In support of the contention that the appeal was properly dismissed, *Merrick v. Kennedy,* 46 Neb. 264, is cited. In that case it was held that, where an executor or administrator is not pecuniarily affected by the final order of distribution, he cannot appeal therefrom in his representative capacity, since he is not "aggrieved" by such order. Rev. St. 1913, sec. 1498. In the present case, however, the administrator contends that the order of distribution pecuniarily affects him, since he had already paid out the proceeds of the judgment, and that he is therefore "aggrieved" and entitled to prosecute an appeal. The appeal is taken in his representative capacity. An appeal bond was not given. Craig's right to appeal as an individual, or as a distributee, has not been exercised. The problem is therefore reduced to the following inquiries: Was Craig, the administrator, "aggrieved" in his representative capacity? Is he as administrator of the estate of Catherine E. Craig, deceased, pecuniarily affected by the final order of distribution? He concedes that the funds for distribution were received by him in his representative capacity, but he challenges the correctness of the order designating the distributees and adjudicating their respective shares. As already stated, the funds were the proceeds of a judgment for damages. When the administrator ignored decedent's son in making distribution, the record in the county court presented for adjudication undetermined questions relating to heirship and to the distributive shares of those entitled to the estate.

The rule is that payments to distributees by the administrator without an order of court are made at his peril.

Boales v. Ferguson, 55 Neb. 565. If the court subsequently directs payments to other claimants, the administrator may be pecuniarily affected by the order, but the loss, if any, falls upon him individually, and not upon the estate. Under the circumstances of the present case as applied to the right of appeal, the estate itself is not affected by the final order of distribution, which neither increases nor diminishes the assets. The law does not permit the person who represents the estate to use it for individual purposes. *In re Barker's Estate,* 26 Mont. 279; *Ansel v. Kyger,* 60 Ind. App. 259; *Moore v. Ferguson,* 163 Ind. 395; *Succession of Hartigan,* 51 La. Ann. 126; *In re Heldman's Estate,* 135 N. Y. Supp. 143. Craig is not entitled to prosecute the appeal in his representative capacity at the expense of the estate and without an appeal bond. He is not thus representing the estate, but is seeking to protect individual interests. If the court's distribution is erroneous and that of the administrator correct, the latter had an adequate remedy by means of an individual appeal perfected by an appeal bond. *In re Williams,* 97 Neb. 726.

It follows that the appeal from the county court to the district court was properly dismissed.

AFFIRMED.

EDWARD J. EPSTEN, APPELLEE, V. HANCOCK-EPSTEN COMPANY, APPELLANT.

FILED JULY 3, 1917. No. 20084.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: IMPAIRMENT OF EARNING POWER.** Under the workmen's compensation act compensation cannot be awarded for the loss of a toe unless the injury has impaired the earning power of the employee. Rev. St. 1913, sec. 3662.

2. **———: ———: AMOUNT OF COMPENSATION.** Under the workmen's compensation act, providing for compensation for partial disability at the rate of 50 per cent. of the "difference between the wages received at the time of the injury and the earning power of the employee thereafter," the fact that the employee earns higher

wages after than before the injury will not deprive him of compensation to which he is entitled, where he receives higher wages because he has by education and training fitted himself for more remunerative employment. Rev. St. 1913, sec. 3662.

3. ———: ———: MEDICAL EXPENSES. Under the workmen's compensation act, declaring that the employer shall be liable for "reasonable medical and hospital services" rendered "during the first twenty-one days after disability begins," an employer who has provided necessary medical attention during the three weeks subsequent to an injury sustained by an employee is not liable for medical expenses subsequently incurred by the latter after blood poisoning developed. Rev. St. 1913, sec. 3661.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed as modified.*

Nolan & Woodland, for appellant.

Montgomery, Hall & Young, contra.

ROSE, J.

This is an action to recover compensation for an injury sustained by plaintiff April 29, 1915, while in the employ of defendant. In operating a press, plaintiff placed his left foot under the plunger, which crushed his great toe. Medical attention was promptly furnished by defendant. Plaintiff returned to his employment May 18, 1915, and worked until May 26, 1915, when blood poisoning developed. He then went to a hospital, where his injured toe was amputated at the second joint. In the fall of that year he attended a business college, returning to work in defendant's office May 20, 1916. At the time of his injury, April 29, 1915, his wages were $7 a week. When he returned nearly a year later, he received $10 a week. At the time of the trial he was receiving $15 a week. The district court awarded him $5 a week to May 20, 1916, and in addition held: "That plaintiff is also entitled, for the permanent injury to his foot, which injury has permanently lessened the use of such foot, to the sum of $1 a week for 245 weeks, being the sum of $245. Plaintiff's claim for medical and hospital expenses incurred after blood poisoning developed was disallowed. Defendant has appealed

from the award of $245, and plaintiff has filed a cross-appeal from the order disallowing his claim for medical and hospital expenses.

Defendant contends that, since plaintiff's earning capacity has not been reduced because of the injury, he is entitled only to compensation for the actual loss of earnings from the time of receiving the injury, April 29, 1915, to May 20, 1916, and that the award of compensation for the permanent injury to his foot is not authorized by the statute. The statute makes provision for compensation for total disability, for "disability resulting from permanent injury" on account of the loss of, or "permanent loss of the use of," an arm, hand, leg, foot, or eye, and, in other cases of partial disability, the compensation "shall be fifty per centum of the difference between the wages received at the time of the injury and the earning power of the employee thereafter." Rev. St. 1913, sec. 3662. The statute does not, as is the case in many of the states, make provision specifically for the loss of toes or fingers. Unless such injuries cause the "permanent loss of the use" of the foot or hand, the compensation seems to be determined by the "difference between the wages received at the time of the injury and the earning power of the employee thereafter." Rev. St. 1913, sec. 3662. The statute conclusively presumes that for the loss of, or the permanent loss of the use of, a hand, arm, foot, leg, or eye, the proper compensation is 50 per cent. of the wages for a specified number of weeks, respectively. For any other partial disability, compensation is to be determined by proof of impairment of earning power. If an employee after his injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired. Such evidence, however, would not necessarily be conclusive, since after the injury he might for various reasons receive higher wages, though his earning power had been impaired by the injury. A general advance in wages might enable the injured employee to secure the same wages after as before the injury, though partially disabled. In the

present case it is a reasonable inference from the evidence that plaintiff received higher wages because he had by education and training fitted himself for more remunerative employment. There is evidence tending to show that he is unable to perform the duties of his former employment. The evidence justifies a finding that his earning capacity has been impaired. He concedes, however, that the award of a lump sum was erroneous, and in that respect the judgment will be modified.

On cross-appeal plaintiff contends that the court erred in refusing to make an award for medical and hospital expenses incurred after blood poisoning developed, and cites *Johansen v. Union Stock Yards Co.*, 99 Neb. 328. It was there held that, where an accident which at first appeared to be trivial later resulted in a diseased condition destroying the sight of an eye, the "injury," within the meaning of the statute, occurred when the diseased condition culminated, there being no apparent "violence to the physical structure of the body" at the time the accident occurred. In the present case an injury was apparent at the time of the accident. Plaintiff was then disabled, and did not return to work for nearly three weeks. During that time his employer provided the necessary medical attention. The medical and hospital expenses for which plaintiff seeks compensation were not rendered "during the first twenty-one days after disability" began. Rev. St. 1913, sec. 3661. His claim therefor was properly disallowed.

The judgment of the district court, modified to require weekly payments instead of awarding a lump sum, is affirmed.

MODIFIED AND AFFIRMED.

LETTON and CORNISH, JJ., dissent.

EDWARD SODOMKA, APPELLEE, V. CUDAHY PACKING COMPANY ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19192.

1. **Negligence:** COMPARATIVE NEGLIGENCE. In an action for damages caused by the negligence of the defendant, the plaintiff may recover, although himself guilty of contributory negligence, if his negligence was slight as compared with the negligence of the defendant.
2. ———: ———: QUESTION FOR JURY. In such case questions of negligence and contributory negligence are for the jury, and it is for the jury to find whether the plaintiff's negligence, if any, was slight as compared with that of the defendant. But, as in other cases, the verdict must have evidence to support it.
3. ———: GROSS NEGLIGENCE. To open the door of an elevator shaft and then turn one's back thereto and so enter it without looking to see whether the elevator is there is such gross negligence that one so doing cannot recover damages caused by falling down the shaft.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

James C. Kinsler, for appellants.

William R. Patrick and *C. J. Southard, contra.*

SEDGWICK, J.

The plaintiff, an employee of the defendant, fell into the elevator shaft and was injured, and brought this action against the defendant to recover damages. There was a verdict and judgment for the plaintiff for $10,000. The defendant appealed. It is the companion case with *Sodomka v. Cudahy Packing Co.,* p. 448, *post,* which arose out of the same transaction.

The plaintiff, in the performance of his duties, undertook to take a two-wheel truck by way of the elevator from the first floor to the third floor. He went to the elevator with his truck, and rang for the third floor. He opened the door of the elevator, and then turned his face to the truck, and when he heard the elevator come up he backed into the shaft, supposing that the elevator had stopped; but the

elevator had gone on up to the next floor, and so he fell and hurt himself. He relies upon a custom to call the elevator by a certain number of rings indicating the floor at which it is to stop. The evidence shows that the elevator went to the next floor above. The plaintiff says the custom was, when the elevator man was not intending to stop the elevator where it is called, that the elevator man should notify him that he was going up higher, and he relied upon this custom, and so did not look to see whether the elevator had stopped or not. There is some evidence of a custom, as the plaintiff contends, to enter the elevator shaft backward without looking to see whether the elevator was there. Whether this custom, if there was one, was confined to this young man alone is not very clear. He was about 17 years of age, had worked in this building about two years, and ought to know that such a custom was dangerous, and to follow and rely upon such a custom was gross negligence. If we admit that the elevator man was not a fellow servant, and admit that he was negligent in not notifying the plaintiff that he did not intend to stop at his floor, and that therefore the negligence of the defendant was a proximate cause of the injury, the question then comes as to the negligence of the plaintiff himself. If the negligence of the plaintiff was slight in comparison with the negligence of the defendant, he might still recover.

We think that to back into the elevator shaft without looking where he was going is negligence, and that it is such gross negligence that no jury should be allowed to find that it was slight in comparison with the negligence of the defendant. It is difficult to see how one could be guilty of more gross negligence than to back into an elevator shaft without looking to see where he was going. His relying upon a custom when nature had given him eyes is not excusable.

The judgment of the district court is

REVERSED.

MORRISSEY, C. J., dissents.

LETTON, J., not sitting.

FRANK SODOMKA, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED JULY 3, 1917. No. 19224.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

James C. Kinsler, for appellant.

William R. Patrick and *C. J. Southard, contra.*

SEDGWICK, J.

This action is based upon the same facts involved in *Sodomka v. Cudahy Packing Co., ante,* p. 446. That was an action by the young man who was injured by the accident. This case is by his father to recover for loss of services of his son. There was a verdict and judgment for the plaintiff.

For the reasons there given, the judgment is reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., dissents.

LETTON, J., not sitting.

ARTHUR J. KOENIGSTEIN, EXECUTOR, APPELLANT, V. ALBERT FINKE, APPELLEE: HATTIE LINDSAY, INTERVENER, APPELLANT.

FILED JULY 3, 1917. No. 18716.

1. **Insurance: BENEFICIAL INSURANCE: DEPENDENT.** The statute should be liberally construed in determining whether the beneficiary named by the insured, in a fraternal beneficiary association, is a "dependent" within the meaning of the statute.

2. ———: ———: ———. When the beneficiary named performs continued and necessary personal services for the insured under an agreement that the insured will contribute to her support by making provision for her for that purpose in his will, she is to that extent dependent upon him, and should be so held in construing the statute. The insured would be morally, if not legally, bound by such agreement.

3. ———: ———: CHANGE OF BENEFICIARY. If the insured in pursuance of such agreement makes her the beneficiary in his will, and the company has notice of that fact, and of the reason for so doing, and does not object, but allows all parties to believe that such beneficiary will be recognized as such by the company, and afterwards, in an action upon the certificate by such beneficiary and the administrator of the estate of the insured, pays the money into court and makes no defense, this will be a sufficient change of beneficiaries in favor of the person so named by the insured.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed, with directions.*

William V. Allen, William Dowling and *Arthur J. Koenigstein,* for appellants.

Arthur C. Mayer, contra.

HAMER, J.

Arthur J. Koenigstein, as executor of the last will and testament of Friedrich Finke, deceased, brought this action as plaintiff in the district court for Madison county against the Grand Lodge of the Order of the Herman Sons of Nebraska and Albert Finke, defendants. Hattie Lindsay became intervener. The action is brought upon a beneficiary certificate for $500 issued by a fraternal insurance

company to Friedrich Finke. Albert Finke is the brother of Friedrich Finke. The intervener, Hattie Lindsay, filed an amended petition of intervention. After the filing of the petition the fraternal association paid the money into court, where it awaits the rendition of proper judgment. Albert Finke demurred to the plaintiff's petition and the petition in intervention as amended, as not stating "a cause of action in favor of the plaintiff and against the defendant, Grand Lodge of the Herman Sons, or against this demurring defendant," and judgment was entered in his favor, from which the administrator and the intervener appeal. The intervener assigns the following errors: (1) The district court erred in sustaining the demurrer of Albert Finke; (2) the association has paid the money into court, and therefore waives any right it may have in the premises and declines to become a litigant in the case. This leaves the sole question to be determined, whether Mrs. Lindsay's petition of intervention states a cause of action on her account against the fund in court.

She alleges the existence of the company at the time the benefit certificate was issued to Friedrich Finke and its existence now, also that he was eligible to insurance in the association, and was insured for $500 in the event of his death, and that he died in good standing in the Order May 4, 1912, having complied with all the requirements of said beneficiary certificate and with the by-laws of the defend ant, and that said certificate then became due and payable; that said Friedrich Finke had no friends or relatives living in the United States, and for a long time prior to his death was greatly afflicted with tuberculosis, and was thereby so incapacitated as to require the constant attendance of a nurse; that many months prior to his death said Friedrich Finke orally contracted with the petitioner, who was not related to him by blood or marriage, that in consideration that she would take him into her home and would nurse and would care for him, and furnish him with food, raiment, shelter, medicine and medical attendance, and such things as his condition required until his death,

he would assign and transfer to her said beneficiary certificate or policy of insurance, and would make her the beneficiary thereof, and would make and sign an instrument in writing, which he did April 11, 1912, purporting to be his last will and testament, and would thereby assign and transfer to her said beneficiary certificate, and make her the beneficiary thereof; that in pursuance thereof said Hattie Lindsay did all that she had agreed to do; that said Germania Lodge, well knowing of the performance on the part of the petitioner of her part of said contract, and upon the strength thereof relying upon the fact that she was to be considered and treated by the said Friedrich Finke as the beneficiary of said benefit certificate or policy of insurance, the said Germania Lodge No. 1 of Norfolk, Nebraska, which is a part of defendant's organization, by and through its officers, assented to said substitution of the petitioner as the beneficiary of said benefit certificate or policy of insurance, and that said defendant never protested against or warned the petitioner that her claim to said benefit certificate or policy of insurance would be contested or objected to on its part, whereby the intervening petitioner avers that the defendant waived any right it might have in the premises to protest against or object to the substitution of the petitioner as the beneficiary of said benefit certificate or policy of insurance, and is estopped to deny the petitioner's right to recover herein; that by reason of the issuance of said beneficiary certificate and the assigning thereof and the death of said Friedrich Finke said sum of $500 became due and owing to the intervener with 7 per cent. interest thereon from May 4, 1912.

The fund is in the custody of the law. It is a fund in the hands of the court. The contract made and the work which Mrs. Lindsay was doing for the testator were known to the Grand Lodge of the Order of the Herman Sons of the state of Nebraska, and it made no protest or opposition thereto. It seemingly acquiesced in all that was done.

By its silence it became estopped to deny the validity of the contract and its performance by the intervener.

Did Friedrich Finke exercise his right to substitute a new beneficiary? The beneficiary certificate contained the clause: "At the time of admission every brother has to state in his application the person or persons who are to be the beneficiary of the insurance money after his death. However, the brother may at any time withdraw these names and make any other person the beneficiary of the insurance money, providing, however, that the grand lodge receive a written notice thereof. To make such a transfer binding, he must hand in such a request to the grand secretary, which will be certified by the secretary of his lodge, with the lodge seal. The fee for this is fifty cents, which the brother has to pay. As receivers of the insurance sum, only the wife, children, or other blood relatives, also foster parents or other legally recognized representatives, may be designated."

It would seem that there was an earnest purpose on the part of the Order of the Herman Sons to pay the sum of $500 upon the decease of a brother in good standing to the person who might be the beneficiary.

The first section of article 1, relating to the objects of the order, contemplates that "widows and orphans and other survivors * * * may be supported properly and kept from want at the time when help is most needed, that is, when the support has been taken away from them." It will be seen that it need not be a widow or an orphan, it may be "other survivors." Should it apply to one situated as the intervener is here? Mrs. Lindsay was taking care of the insured, who was sick unto death, and was giving him food and medicine and shelter. She was acting as a nurse and in a menial capacity. This and other similar allegations are sufficient, in the absence of any motion to make the pleading more definite and certain, to admit proof that she needed the support which this policy would give her, and that she depended upon it for the comforts and necessaries of life. If he did not take care of her no one else

would. He had nothing with which to reward her except this insurance policy, but he had promised to use that, and that was as substantial as if he had money in his pocketbook, or other property in his possession, which he might have given this woman. When she had labored to the end and death had laid its cold hand upon the man who was to provide for her, had she nothing to expect from the Grand Lodge of Herman Sons? It was not objecting. It seems to have consented to it. The principal ground for supporting the trial court in sustaining the demurrer to the intervener's petition was that the statute provides that benefits shall not be paid except to certain relatives named or to dependents. It would seem that the provision of the statute relates to the contract to pay, and to its binding force upon the company. In any event it does not relate to the right to make voluntary settlements in accordance with the strongest kind of moral obligations. If, therefore, every person interested in any manner in this company had formally expressed his consent to pay this insurance to this woman, the statute would not be a bar to their doing so. Some courts have held that the local lodge cannot consent for the members, but we have uniformly held that notice to the local authorities, who should be the ones to consent to a transfer of beneficiary, is notice to all the persons interested in the company. But we do not need to put our decision upon that ground. First, was the contract of the deceased followed up by his will and the performance on the part of this woman a sufficient designation of the beneficiary under the circumstances, there being no objection on the part of the company? Second, was this woman a dependent under the allegations of these pleadings, within the meaning of the statute?

In 1 Bacon, Benefit Societies and Life Insurance (2d ed.) sec. 308, the supreme court of Texas is quoted as saying, in *Splawn v. Chew,* 60 Tex. 532: "The right to change the disposition of the money being established in the member, the next question is, how is it to be exercised? It is contended by appellees that it can be exercised only in the

manner pointed out in the third section of the third by-law, which reads as follows: 'Members may at any time, when in good standing, surrender their certificate, and have a new one issued, payable to such beneficiary or beneficiaries dependent upon them as they may direct, upon payment of a certificate fee of fifty cents.' This section is in further recognition of the right to make the alteration, and it seems to be admitted that the surrender of the old certificate and the issuance of a new one under this section would effect a change in the beneficiaries of the policy. But is this the only way in which such a change can be effected? The right to make the change is given by a different section of the by-laws, and exists in the insured so long as he remains a member of the order. A method by which he may accomplish it to the satisfaction of the order is pointed out in the section last cited, but we do not consider this as exclusive of all other ways of effecting the same object. The design of this section is to protect the interests of the corporation. The company is entitled to know who are the parties entitled to the benefit money, and this is an effectual and certain means of giving that information. But, like all such provisions in the by-laws of private corporations, it may be waived at the option of the corporation, being for its benefit alone. It has been so held in reference to such provisions when prescribed in mandatory terms. If they can be waived in such cases, much stronger would seem to be the reason why this can be done when the course to be pursued is directed, as in this instance, in permissive language alone. * * * As a by-law of the order this provision entered into the understanding between the company and the member effecting the insurance, and the rights of interested parties are not strengthened by the fact that the same provision is found in the certificate. It is still a condition for the benefit of the company, to be insisted upon or waived according to their election."

In *Goff v. Supreme Lodge, Royal Achates,* 90 Neb. 578, it was held: "Where a woman, who is without means, in

good faith leaves her own home and work and assumes and for years faithfully performs the duties of a housekeeper for a member of a fraternal beneficiary association, not related to her by consanguinity, under an agreement that in consideration for such services he will support her and at his death leave her his estate, and no evidence is offered showing any improper relations between them, held that she thereby becomes a dependent upon such member, and as such is eligible as a beneficiary in a certificate of membership issued to him by the association of which he is a member."

In *Keener v. Grand Lodge, A. O. U. W.*, 38 Mo. App. 543, it is said: "I would not restrict dependents to those whom one may be legally bound to support, nor yet to those to whom he may be morally bound, but the term should be restricted to those whom it is not unlawful for him to support."

We think if the insured is under an obligation to help a person in her manner of living she is a dependent, within the meaning of the statute, and we ought not to seek for a more technical definition of a dependent in order to defeat her claim. In fact this court has already so decided. In the *Goff* case, above cited, it was said: "No case has been cited, nor do we think one will ever be decided, holding that a woman, who, without means, in good faith leaves her own home and work and assumes and for years faithfully performs the duties of housekeeper for a man who agrees, in consideration therefor, to support her and at his death leave her his estate, does not thereby become a dependent upon him, and especially so where there is an entire absence of evidence to show any improper relations between them."

If this woman had means of her own so that she did not depend upon the promise to reimburse her, and so that she could abundantly afford to support him in his last day as an act of charity, that fact does not appear in the pleadings demurred to, and no such presumption ought to be indulged.

The sister of the deceased, one of the original beneficiaries made no claim to the money. It is said that the sister is dead, but of course this does not appear in the pleading, and it is not shown of course by the demurrer of the brother, Albert Finke.

It will be seen that under the case above cited the intervener might have a home and some money, and may have had the capacity to earn other money, and yet be a dependent within the meaning of the statute. We think that the demurrer of Albert Finke should be overruled. As it is agreed between the parties that a final disposition of the rights of the parties shall be made upon a consideration of the demurrer, it is ordered that the district court pay this money to the intervener.

Reversed and remanded for this order to be carried out.

REVERSED.

ALVA H. JACKSON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JULY 3, 1917. No. 19289.

1. **Continuance:** DILIGENCE. Ordinarily a party who fails to have a subpœna issued for a necessary witness and relies upon the latter's promise to appear and testify has not exercised such diligence as requires a continuance in case the witness fails to keep his promise.

2. ———: ———. The nonattendance of witnesses subpœnaed by plaintiff when the trial commenced is not of itself sufficient ground for a continuance at the request of defendant who relied upon plaintiff's efforts to procure the attendance of such witnesses.

3. **New Trial:** NEWLY DISCOVERED EVIDENCE. "A new trial should not be granted a party on the ground of newly-discovered evidence, unless he makes it appear that the newly-discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial." *Cunningham v. State*, 56 Neb. 691.

4. **Appeal:** CONFLICTING EVIDENCE. Where there is a conflict of testimony, and the jury might have reached a different conclusion from

that which they returned in their verdict, but the evidence sustains the verdict, and the case is not shown to have been properly tried, the verdict will not be set aside unless it is clearly wrong.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Affirmed.*

John L. Webster and *W. Ross King,* for appellant.

B. H. Dunham, Herman Aye, Herbert S. Daniel and *John A. Moore, contra.*

HAMER, J.

Plaintiff brought this action to recover damages in the sum of $25,000 for an injury which, according to the petition, occurred by reason of the negligence of defendant's employees in prematurely starting a street car which plaintiff was attempting to board in the city of Omaha, the injury requiring the amputation of plaintiff's left leg. The answer was a general denial. From a judgment on a verdict in plaintiff's favor for $12,000 defendant appeals.

The principal assignments of error relate to the overruling of defendant's motion for leave to withdraw a juror and for a continuance of the case on account of the nonappearance of two witnesses, and the overruling of defendant's motion for a new trial. A proper understanding of these questions necessitates a review of some of the evidence. According to plaintiff's testimony, about 6 o'clock on the afternoon of July 22, 1913, he was returning from work at Twenty-ninth and Dewey streets with two of his employees, Pat Moore and Nels Jensen. The three men rode east to a transfer point at Sixteenth and Farnam streets. While waiting for a north-bound car plaintiff walked north to a flower store on the east side of Sixteenth street, intending to purchase flowers. The store was closed, and plaintiff returned to the corner. In the meantime a north-bound car had stopped at the northeast corner of the intersection to discharge and receive passengers. A number of persons, including plaintiff's companions, boarded the car. When plaintiff arrived at the rear end of the car it had not yet started. He grasped the hand-hold

over the rear step and lifted his left foot, and as he was placing it on the lower step the car gave a jerk forward, causing his foot to slip as it touched the step, and causing plaintiff to fall with his knee upon the step, his right foot dragging on the ground. While plaintiff was in this position the car proceeded about 20 feet before he was able to lift himself upon the platform of the car. Moore and Jensen were standing behind the conductor on the rear platform. When he arrived at home he found blood on his underwear and a scratch on his knee. He placed peroxide and turpentine on it. Later blood poisoning developed, and plaintiff went to a hospital August 1, where his left leg was amputated December 18.

On defendant's behalf there was evidence tending to show that plaintiff had made a statement to defendant's claim agent August 11, 1913, while plaintiff was in the hospital, and that he stated that he slipped while attempting to board a moving street car. There was also testimony by the conductors and motormen operating cars on Sixteenth street that no such accident as that which plaintiff narrated had occurred.

Moore and Jensen, who, according to plaintiff's testimony, were with him when the accident happened, failed to appear at the trial though a subpœna had been served upon them. When the trial commenced, March 3, 1915, plaintiff caused a subpœna to issue for Moore and Jensen, which was served that afternoon. They did not appear at the trial. That evening and again the next morning plaintiff made inquiry at their lodgings, but was unable to locate them. At the close of plaintiff's testimony defendant requested a a continuance on account of the absence of these men and supported its request by affidavits signed by Moore and Jensen May 30, 1914. Moore's statement was that he was not in Omaha July 22, 1913, when plaintiff testified the accident occurred, but that he was working on a farm in South Dakota; that February, 1914, plaintiff asked him to be a witness in his case against the street railway company and to testify that he was on the rear platform when the acci-

dent occurred, and that affiant narrated such a story to plaintiff's attorney. Nels Jensen's statement was that he saw plaintiff injure himself in July, 1913, while running to catch a street car, and that plaintiff had offered affiant $25 if he would testify that he was on the street car July 22, 1913, and saw the accident which plaintiff claims was caused by defendant's negligence. Defendant contends that it had exercised reasonable diligence to procure the attendance of Moore and Jensen, and excuses its failure to subpœna these men on the ground that plaintiff testified that a subpœna had been issued; that the record showed that these men had been served; and that a week before the trial the men had promised defendant's counsel that they would appear at the trial. The trial court held that defendant had not made a showing of due diligence, and that it was not justified in expecting to prove its defense by witnesses which it expected plaintiff to produce.

In overruling the motion for a continuance, was there "an abuse of a sound legal discretion?" Rev. St. 1913, sec. 7789. *Johnson v. Mills,* 31 Neb. 524, is cited by defendant in support of its contention that it was not lacking in diligence in relying on the promise of Moore and Jensen to appear and testify on its behalf. In that case the absent witness was a defendant whose interest in the result of the action justified his codefendant in relying upon his promise to attend. Ordinarily a party who fails to have a subpœna issued for a necessary witness and relies upon the latter's promise to appear and testify has not exercised such diligence as requires a continuance in case the witness fails to keep his promise. *Life Insurance Clearing Co. v. Altschuler,* 55 Neb. 341; 9 Cyc. 114.

Under the circumstances of this case, reliance upon the fact that plaintiff had issued a subpœna summoning these men as witnesses in his behalf does not excuse defendant's lack of diligence. Some courts have held that a party who relies upon the fact that his opponent has caused a subpœna to be served upon a witness is not entitled to a continuance in case the witness fails to appear, since the party

seeking the continuance has not exercised diligence. *Hutts v. Shoaf,* 88 Ind. 395; *Moore v. Goelitz,* 27 Ill. 18; *Drake v. State,* 5 Tex. App. 649. Whether this rule should be applied in all cases need not be decided. Under the circumstances of this case, however, there was good reason for denying a continuance for lack of diligence. The trial court did not abuse its discretion in overruling the motion for a continuance.

In support of its motion for a new trial, defendant produced affidavits by Moore and Jensen in which it was stated that they left the state immediately after being served with the subpœna; that they were not induced to do so by any person, but did so in order to avoid exposing the false claim of plaintiff who was their friend, and that when they learned that the trial had ended they returned to Omaha. Defendant also filed affidavits made by five other men who state that they were approached by plaintiff to falsely testify that they saw the accident upon which he bases his claim for damages. While it is stated in the affidavits filed by defendant that it had no knowledge of these witnesses until after the trial had ended, there is not a sufficient showing of diligence. It is not shown why such testimony and these new witnesses could not have been discovered by exercising reasonable diligence before the trial commenced. The name of one of the five affiants, Sorensen, was disclosed to defendant in the affidavit made by Moore eight months before the trial. Defendant was not surprised by plaintiff's testimony. The trial court did not err in overruling defendant's motion for a new trial. *Butterfield v. City of Beaver City,* 84 Neb. 417; *Andrews v. Hastings,* 85 Neb. 548; *Dresher v. Becker,* 88 Neb. 619; *Van Horn v. Cooper & Cole Bros.,* 88 Neb. 687. The rule in this state is: "A new trial should not be granted a party on the ground of newly-discovered evidence, unless he makes it appear that the newly-discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and

produced it at the trial." *Cunningham v. State,* 56 Neb. 691; *Butterfield v. City of Beaver City,* 84 Neb. 417.

According to the evidence contained in the record, the inception of the wound which caused the plaintiff to lose his leg was due to the negligence of the defendant company in starting its car while the plaintiff was trying to get on board and in dragging the plaintiff some distance before the car stopped. There is a conflict of testimony, and the jury might have reached a different conclusion from that which they returned in their verdict; but, as there is evidence which sustains the verdict and the case is not shown to have been improperly tried, we are unable to set aside the verdict on the ground that it is clearly wrong. " A verdict, supported by competent evidence, will not be set aside simply because it does not comport with the conclusion which this court, as triers of fact, might have reached." *German-American Bank v. Stickle,* 59 Neb. 321; *Beels v. Globe Land & Investment Co.,* 93 Neb. 733.

The judgment of the district court is therefore

AFFIRMED.

LLOYD CHENEY, V. STATE OF NEBRASKA.

FILED JULY 3, 1917. No. 19944.

1. **Larceny**: SUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and the same *held* insufficient to sustain a conviction of the crime of cattle stealing as charged in the information.
2. **Criminal Law**: EVIDENCE: CONFESSION. A statement of facts claimed by the prosecution to be equivalent to a confession of guilt will not be considered unless it is first shown to have been voluntarily made and without inducement. *Jones v. State,* 97 Neb. 151.
3. **Larceny**: PROOF. In order to convict the defendant of the crime of cattle stealing, the state must prove beyond a reasonable doubt that the defendant participated in a larcenous taking of the property with the intent to convert the same to his own use.

4. ———: INTENT. A felonious intent to convert the stolen property to the defendant's own use is a necessary element of larceny.

ERROR to the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Earl McDowell, for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe, contra.*

HAMER, J.

The plaintiff in error, Lloyd Cheney, was tried in the district court for Sioux county on the charge of stealing a steer, and was convicted and sentenced to the penitentiary for an indeterminate period of from one to ten years. He brings the case here for review, and alleges certain errors, the more important of which we will discuss.

The first assignment is that the evidence fails to sustain the verdict. It is shown by the testimony that one Chester H. Kramer, on whose premises the steer was kept at the time it was killed, was also informed against, but not prosecuted. The steer appears to have been running in the pasture with Kramer's cattle, and had been there since some time in July. It belonged to a man named Wolfe. Kramer owned the ranch, consisting of about 1,440 acres, and kept there from 40 to 150 head of cattle. He had about 90 there December 10, 1914. He was a man of family, kept house, and had men employed to assist on his ranch. He had lived many years at Bancroft, Nebraska, and moved from there up to Sioux county, and staid there about two years, when he moved back to the eastern part of the state and located at Pender, Nebraska, where he was living at the time of the trial of Lloyd Cheney. When Kramer moved up to Sioux county from Bancroft he took with him John E. Marshall, a witness in this case. Marshall was in the employ of Kramer on the ranch, and was 31 years old. He was a single man, and lived at Kramer's residence. He (Marshall) and Lloyd Cheney worked for Kramer, the latter only a small part of the

time. They had been building a shed for him. In this shed the steer was killed about noon on the 10th day of December, 1914. The defendant was a single man. He lived with his sister, Mrs. Chris Morgan, and her husband. He was accustomed to visit at Kramer's, presumably with Ed. Marshall. Kramer testified on behalf of the state that Cheney had staid at his house on the night of December 9, 1914. It is undisputed that when the steer was killed Kramer, the owner of the ranch, Ed. Marshall, who was his hired man, and the defendant, Lloyd Cheney, were all present and participated in the butchering. Kramer testified that Lloyd Cheney "was back and forth between the two places every day or so." He was then referring to his own residence and the Morgan residence; that the defendant had been at his house three or four times between Thanksgiving and the 10th of December, 1914, and stayed over night two or three nights, and after that that he was there nearly all winter. Prior to the 10th of December, 1914, he had resided most of the time at the Morgan residence, although the witness Kramer testified that the defendant was first at one house and then at the other. Kramer was informed against, but he was not prosecuted. He testified on behalf of the state and against the defendant. The older men, Kramer and Marshall, were not prosecuted, but the young man was prosecuted. Cheney does not seem to have received any of the meat. Kramer, being a man of family and having help employed, may have needed it.

The testimony of the main witness for the prosecution, Chester H. Kramer, seemed to be introduced to show that he (Kramer) was not to be blamed for butchering the steer. He said Cheney had been riding over his (Kramer's), place with him, and that they had talked about the ownership of the steer; that the conversation "naturally took place" on the ranch "some time or other when we were all together;" that, when riding over the place with the witness Kramer, Cheney had made mention that "we needed some meat;" that Cheney said: "This steer ought

to be butchered before somebody came and claimed it." Kramer's testimony makes Cheney apparently anxious that meat shall be speedily furnished for the Kramer family and also for the Morgan family, and Cheney is made to appear anxious for fear the supply of meat will be lost because somebody may come and claim the steer. For so young a man, 21 years old, Cheney is made to show a very active and persistent anxiety to cause meat to be furnished for other people's families. Kramer lays the whole blame of bringing the steer out of the pasture and up to the shed upon Cheney. He has Cheney rope the steer, and he says that no other person helped Cheney. But Marshall, Kramer's hired man, who was then working for Kramer testified that Cheney did not rope the steer until Kramer and Cheney had together driven the steer up to the shed. Marshall testified: "Well, sir, I don't know whether they drove him in (to the shed) or roped him and dragged him in;" but Marshall remembered that the day the steer was killed Kramer had gone over to Morgan's place in the morning, and further remembered that Kramer was with Lloyd Cheney when they got the steer and brought it in. He says that he (Kramer) "come in with him. Q. Was he walking or horseback? A. I think he was horseback." Mrs. Chris Morgan testified that the morning of the day when the steer was killed Kramer came over to her house and asked her brother in her presence "if he would go over and help him butcher," and that her brother "told him he would," and then that they sharpened their butcher knives on the grindstone before they went over to Kramer's, and that the night before that particular night her brother had stayed at Kramer's. Her statement as to where her brother stayed on the night of the 8th of December is corroborated by Marshall's testimony. Marshall testified that he (Marshall) was working for Kramer on the 10th of December, 1914, and that the steer was butchered that day about noon, that Cheney "was there helping off and on," and that Cheney did not stay at Kramer's the night before the steer was

killed. Marshall testified that he (Marshall) slept at Kramer's the night before the steer was killed, and testified as follows: "Q. You may tell the jury whether Lloyd Cheney staid in that house that night or not. A. Well, sir, I don't just remember; I don't think he did, though. Q. Who staid in the ranch house that night? A. Mr. Kramer and Mrs. Kramer, Mrs. Bonsel, and myself." On the morning of the day when the steer was killed Kramer left his home to go to Morgan's residence, presumably. Marshall so testified, and Mrs. Morgan saw Kramer there at her house and heard him ask her brother to come and help butcher, and Cheney himself so testified. At Morgan's place they sharpened their butcher knives, and then went over to the shed on Kramer's place, where they were going to kill the steer as soon as they got it out of the pasture and drove it up there. Cheney testified that Kramer came to Morgan's place that morning and asked him (Cheney) if he could go and help butcher, and, when he said that he could, asked him to get a couple of butcher knives, and then, when he got the knives, they went out to the grindstone, and Kramer turned the grindstone and Cheney held the knives on the stone so that they might be sharpened. As they went to Kramer's through Kramer's pasture they picked up the steer. The steer and other cattle were running in a pasture of 600 to 800 acres belonging to Kramer. They (Kramer and Cheney) were both on saddle horses. Cheney so testified, and he is corroborated by Marshall. When they got the steer up to the shed then Cheney roped it, and when they got the steer into the shed Marshall tried to kill it with an ax, but, as the steer would not stand still, Marshall failed in his efforts to kill it, and then he (Cheney) shot the steer with a revolver, and in that way killed it. Marshall had known Kramer at Bancroft, and came up from there with him to Sioux county, and worked for him and remained with him about 14 months and until after the steer was killed. Marshall testified that Kramer and Cheney came in with the steer together. He supposed that they came from the pas-

ture. He remembered that "they were both there with the steer. * * * Q. And how close to the shed were they? A. I don't know; they were right close to it, though. * * * Q. What is your best recollection as to whether Kramer was on horseback or on foot? A. I am satisfied he was on horseback that morning. Q. At this particular time. A. Yes; he had his horse down there then, when they was down there at the shed." When asked how Kramer came over to Morgan's place on the morning of the day when the steer was killed Mrs. Morgan answered: "He was on horseback." Marshall also testified that Kramer told Cheney "to go ahead and shoot it," meaning the steer. This was after Marshall failed to kill it with an ax.

There was some kind of an arrangement by which Kramer was not to be prosecuted. That Kramer should show anxiety to secure the conviction of Cheney was natural if it in any way affected the proceedings touching himself. That some sort of an understanding was arranged between the county attorney and Kramer is shown by the county attorney's testimony, which is very candid. The county attorney testified: "Q. Mr. Baker, tell the jury what arrangement you have made with Mr. Kramer as to immunity in the case of the state of Nebraska against Kramer, implicated in this case. * * * A. In the case of the state against Kramer, you mean? Q. Yes, sir. A. In that case the facts came to my knowledge that there had been a butchering down near Glen, and that both Cheney and Kramer were implicated in this butchering, and I believe that the sheriff first brought the information to me about that; * * * and he (the sheriff) brought Kramer to my office in the courthouse; and I believe that there Kramer related all about this butchering, and made an affidavit to what had happened down there, and I told Mr. Kramer that I could not guarantee him anything, but that I would say to the district judge that he had turned state's evidence, and that if he would do the square thing that I would give him a recommend to the judge." In any event Kramer would seem to have been quite active, and his ac-

tivity was directed against Cheney. He may have been trying to earn the recommend.

The youngest man in the company was selected seemingly as the person upon whom to inflict punishment. The jury were not satisfied, and did not wish to inflict the punishment upon young Cheney which their verdict called for, because they recommended his pardon. When a recommendation for a pardon comes from a jury in a cattle country and in a cattle-stealing case, it may be said that there is some substantial reason for it. In the verdict in this case the jury said: "But this jury strongly recommends that the defendant be pardoned."

The defendant testified that he staid at the home of his sister, Mrs. Morgan, on the night before the steer was killed, and that his sister's husband, Chris Morgan, was away from home at that time, and that his sister and her two little children were the only persons there except himself; also that he had never talked with Kramer or any one else concerning a desire to help in butchering the steer "which was afterwards butchered;" that Kramer came over to Morgan's place on the morning of the day when the steer was killed, and that he was riding a little buckskin pony; that it was then that Kramer asked for the butcher knives and asked the defendant to help him butcher, and that he (Cheney) agreed to do so, and that together they then sharpened the knives on the grindstone, and that he (Cheney) got his saddle horse and went home with Kramer, and that Kramer said that the steer that he was going to butcher was on the north quarter, and that they then took the one that was butchered and 12 or 14 others and drove the bunch up together; that Kramer said, "Let's kill him in the shed we are building," and that the shed would "be a windbrake;" that he (Cheney) then caught the steer (with a rope) and dragged it into the shed "out of the wind;" that Kramer said to "knock it in the head;" that they hit it a time or two with an ax and could not hit it right, and Kramer said, " 'Cheney, shoot him,' and I had a revolver on my saddle, and I shot it, and Mr. Kra-

mer cut its throat;" that at that time he (Cheney) had no knowledge as to who owned the steer, and thought it belonged to Kramer, and that Kramer said it did; that the witness saw Marshall come in; that the witness was sitting down scraping the neck of the steer, and he heard "something sizzling in the fire," and that he looked back and that there was a piece of hide in the fire; that the witness inquired what was being done, and that Kramer said, "That's none of your damn business;" that a piece of hide had been cut out, and it was that which was sizzling in the fire; that the witness was about ten feet from the fire; that the witness ate supper at Kramer's, and after that went home. The defendant explained that Kramer came over on the day when the steer was killed and asked him to come over and help butcher that day, and that he said, "Yes; I guess so." He had been at Kramer's the day before, and was then working on the shed, but that night he went home. He did not seem to have a guilty knowledge concerning the butchering of the steer for the purpose of appropriating it. His testimony was corroborated for the most part by all the witnesses who knew the facts except Kramer, who was peculiarly circumstanced. Kramer testified that at the time of butchering the steer Cheney threw the piece of hide in the fire which bore the brand that was on the steer. Kramer's testimony was disputed by the evidence of both Cheney and Marshall. They both testified that it was Kramer who threw the piece of hide in the fire, and they substantially agree as to the indignant inquiry which Cheney made of Kramer concerning what he was doing when he threw the piece of hide in the fire. Marshall testified as follows: "Q. Did you see any skin or hide in the fire burning? A. Yes, sir. Q. Did you hear anything said by the defendant to Mr. Kramer at that time? A. I heard them talking; I thought they was in fun, and I didn't pay much attention, Q. What was said by Lloyd (Cheney) to Kramer? A. Lloyd asked him what he was doing. Q. And what was the reply? A. I don't remember whether he said 'darn' or 'damn';

he said it was none of his business anyway. Q. What was Lloyd doing at that time? A. Well, sir, I don't just remember; he was up at the head end of the steer." This puts Cheney at work where he could not have been cutting out the brand and throwing it in the fire. Cheney's inquiry as to what Kramer was doing related to Kramer's act in cutting out the piece of hide bearing the brand and throwing it in the fire. Kramer resented Cheney's right to interrogate him. If Cheney had been an accomplice of Kramer he would not likely have made such an inquiry in such a way. He would not have been surprised and angry. The point of counsel for the defendant that the evidence is insufficient to sustain the verdict has much to support it. There is no evidence that supports the charge against the defendant except Kramer's testimony. Kramer also testified that he thought Cheney had told him, he was not sure. Kramer tried to lay all the blame for what was done in butchering the steer upon Cheney, except that he acknowledged that he and Cheney took the hide off. Kramer testified to the brand and called it a double "T." He remembered also that a fire was built inside of the shed so that they could warm their hands by it while butchering the steer, but he was sure that Cheney destroyed the brand by cutting it out and putting the piece of hide on which it appeared in the fire, and he tried to put Chris Morgan in the deal, athough Morgan was not at home and was not shown by any testimony to have had anything to do with the theft. The purpose of this was probably to create suspicion against Cheney because he lived with his sister and brother-in-law.

The defendant was born in Box Butte county, Nebraska. His father took him along with him to Alabama when he was about nine years old, and subsequently the son returned to Nebraska and to the old neighborhood where he was born, and when his sister got married he made his home with her and her husband, Chris Morgan. He got employment at such work as he could get.

The county attorney in his cross-examination of Cheney seemed to attempt to make a point of some sort against Cheney because, when Kramer and Cheney were on their way to Kramer's place from Chris Morgan's residence, they picked up a bunch of cattle on Kramer's land and drove them and the steer that was to be killed down to the shed. It is a matter of common knowledge that one steer by himself is hard to drive, but he is easy to drive if he is with ten or a dozen other steers and they are all driven together. It is almost impossible to drive one hog by himself, but a dozen hogs may be driven together readily. This is common farm knowledge. The thing that they were doing was driving that one steer down to the shed so that he might be butchered, but they took the other cattle along so that one steer would be easy to drive. It was done under the direction of Kramer. It was Kramer's adventure. We are unable to find other testimony than Kramer's to the effect that Cheney knew that the steer belonged to some other person than Kramer. As to Kramer, the killing of the steer was theft because he was killing the steer to appropriate it and to use the meat. As to Cheney, the steer was to be killed for a lawful purpose, and he helped in the killing and butchering because Kramer asked him to do so. There is a failure of proof to connect Cheney in a felonious way with the killing of the steer.

There seems to have been an effort on the part of the sheriff to get Cheney to plead guilty before the county judge at the preliminary hearing. With the view to securing such a plea, the sheriff refused to tell Cheney whether "Kramer had turned state's evidence," but told him that he (the sheriff) "knew all that Kramer and Marshall knew about it." If Kramer was giving a false account of the killing of the steer, which he seems to have been doing, and this false account was carried to Cheney by the sheriff, it would justly excite the apprehension of Cheney, and, entirely independent of his guilt or innocence. Cheney might fairly and reasonably conclude that Kramer, and

the sheriff himself, would give just such an account of the butchering of the steer as would result in his (Kramer's) acquittal and in Cheney's conviction. Under this sort of an account of the sheriff to Cheney the latter appears to have said, according to the sheriff: "Well, then, I will go to the pen as sure as hell." The sheriff further testified: "Q. Did the defendant at that time say anything further to you in regard to the killing of the steer? A. Why, he said they had killed a steer, but he thought it was Kramer's when he killed it." Marshall was never arrested or in any way charged with stealing the steer, but Sheriff Hill seems to have tried to leave the impression with Cheney that both Kramer and Marshall "had turned state's evidence," which of course Marshall could not have done without being charged with the commission of the crime. Hill testified: "Q. And you knew there was no warrant out for Marshall? A. Yes, sir. Q. And did he (Cheney) not tell you after you told him that Ed. Marshall and Kramer had turned state's evidence that if they turned state's evidence they have jobbed me, and I probably will have to do time? A. Yes, sir; he told me that."

While the sheriff, Hill, finally denied that he had told Cheney that Marshall had turned state's evidence, he (Hill) had talked to Cheney in such a way as to induce that belief upon Cheney's part. Hill denied that he told Cheney that on the train, but said he told him that "in the jail." This was deception. The county attorney either did not know that Kramer and Cheney together drove the steer up from Kramer's pasture, or he desired to use the evidence for the sole and exclusive purpose of convicting Cheney. In his questions the county attorney is not shown by the record to have asked whether Kramer helped to drive up the steer from the pasture, but he starts in with the narrow inquiry concerning what happened at the shed. At the shed Cheney, who had been asked by Kramer to help butcher, threw the rope around the steer's head and put the other end of the rope on the horn of his saddle and pulled the steer into the shed. When Marshall failed

to kill the steer with the ax, then Cheney shot it at Kramer's request. Examination of Kramer by the county attorney: "Q. And how did this steer come to be in the shed? A. It was taken there. Q. Taken there by whom? A. Mr. Cheney. Q. How did he take it there? A. He had a rope on him and took him in with a saddle horse." The witness, John E. Marshall, seems to have also been called Ed. Marshall. He tried to be fairly honest. Kramer at the preliminary testified that he did not ask Cheney to come over to his house and help him butcher, and that he was in the house with Mrs. Chris Morgan. He testified he was there while the knives were being sharpened, but afterward at the trial insisted that he was wrong in his former testimony, and that he was not with Mrs. Chris Morgan at the time the knives were sharpened, but that the knives were sharpened at his (Kramer's) place on his grindstone. He testified that he did not think that he had asked anybody to help him butcher the steer except Ed. Marshall, the man who worked for him. He did not think that there was a grindstone at Marshall's place. He so testified.

When Kramer was asked if he had sold part of "this carcass," he answered that he had not. When asked if he had sold some of the carcass to Scott Chalfaunt, he answered, "Yes, sir," but subsequently amended it by saying that he had sold some of the meat of the second animal butchered, and that Chalfaunt "took a full quarter." He did not know whether the meat of this first steer had lasted until February, 1915.

While this case may be tried again, it is perhaps well to consider some of the other alleged errors. Kramer testified in such a way as to cast suspicion upon the defendant by reason of what he (Kramer) said independently of his direct testimony. "Q. Who was the first man that suggested butchering this animal? A. Chris Morgan. Q. That is the brother-in-law of the defendant? A. Yes, sir." Counsel for the defendant moved to strike this out as hearsay and not binding on the defendant. The motion

was overruled, and the defendant excepted. Morgan was never arrested. Morgan was never charged in any way with being implicated in the theft, and this appears to have been done to give Cheney a rap. It was done upon the theory that the defendant would be guilty of any bad sentiment that Morgan might entertain.

In *Wallace v. State,* 91 Neb. 158, it was said: "In order to convict the defendant of the crime of larceny, as charged in the information, the state was required to prove, beyond a reasonable doubt, that defendant participated in the larcenous taking of the hogs in question from the complaining witness. We think the evidence was insufficient to establish that fact beyond a reasonable doubt."

If Kramer's testimony is to be taken as true, then, and then only, is there enough evidence against Cheney to create any suspicion of his guilt. If we follow the example laid down in the *Wallace* case, we will reverse the judgment of the district court. It should be remembered that Kramer boldly expressed the desire to appropriate the steer. Such testimony should not be permitted to determine the guilt of any person unless it is corroborated by other evidence worthy of belief. The defendant never had the steer in his possession. He did what Kramer requested him to do. He helped to kill and butcher the steer, but he found it in Kramer's possession on Kramer's ranch, and he left it in Kramer's possession at Kramer's shed. He did not remove the steer, and therefore there was no asportation, and consequently there could be no theft. Asportation, nonconsent of the owner, and a felonious intent to thereby convert the stolen property to the defendant's own use are necessary elements of larceny. *Ladeaux v. State,* 74 Neb. 19.

After Kramer butchered the steer Cheney visited with Marshall, who was Kramer's hired man.

The judgment of the district court is

REVERSED.

SEDGWICK, J., not sitting.

ROBERT MCQUILKIN, APPELLEE V. JOHN E. FORD ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19594.

1. **Mortgages: FORECLOSURE: DISTRIBUTION OF PROCEEDS.** One holding a deed of real estate, given to secure him in the payment of any advancements made by him, and who pays one of a series of notes secured by a mortgage on the real estate, is not entitled, in proceedings by the mortgagee to foreclose the mortgage, to share *pro rata* in the proceeds of the mortgaged property.

2. ———: **INSURANCE.** In the absence of any agreement therefor, the mortgagee is under no obligation to insure buildings on the mortgaged premises, nor to prosecute at his own expense a disputed claim for insurance on account of a prior policy which he had held, covering the building destroyed.

APPEAL from the district court for Red Willow county: ERNEST B. PERRY, JUDGE. *Affirmed.*

Lambe & Butler, for appellants.

G. E. Simon and *H. W. Keyes, contra.*

CORNISH, J.

In this action plaintiff seeks foreclosure of a mortgage securing notes given to him as part of the purchase price for land sold, making Ford, mortgagor, and Ballah, then holder of the legal title, defendants. Ford in his answer claims certain credits on the note and $1,500 credit on account of the plaintiff's failure to recover insurance on a building destroyed by a wind-storm. The defendant Ballah, by way of cross-petition, also asks foreclosure of a $2,100 note, being one of the notes secured by the mortgage. Plaintiff in his reply denies liability on account of the wind-storm destroying the building, and denies that the $2,100 note in Ballah's possession was assigned to him; alleges that it was paid, and that his lien for the remaining notes is superior thereto. The trial court found generally for the plaintiff; found that Ford should be credited with $80 interest on the notes; that no liability

existed on account of the destruction of the building; that there was due defendant Ballah from Ford $2,100 on account of the note set forth in the answer and cross-petition; and gave Ballah a lien upon the land inferior, however, to that of the plaintiff.

The defendant Ballah assigns as error the judgment of the court in making his lien inferior to that of the plaintiff.

When the $2,100 note became due the plaintiff took it to the bank where it was made payable, and asked for and received from the cashier of the bank the amount of money due. The cashier at the time wrote an assignment to himself, as cashier, on the back of the note, which plaintiff signed. No negotiations for a transfer of the note were had between them, and the plaintiff did not know that he was assigning the note. Afterwards the defendant Ballah paid to the bank the amount of the note; it was stamped "paid" by the bank and delivered to him.

It appears that prior to this time Ballah, who had been president of the bank, and was then vice-president, living at Norfolk, had spoken to the cashier about the note, saying, as testified to by the cashier, that when the note was presented the bank should "take it up and hold it for him;" that he wanted the bank to "carry him in the bank." In the original sale of the land all of the negotiations were with Ballah. Following the sale Ford gave a deed of the land to Ballah, who testified that it was intended to operate as a mortgage. All payments had been made by Ballah.

The bank never undertook to assign the note to Ballah or to purchase it for him. When it received the final payment from Ballah, it very properly stamped the note "paid." This should have been and we think was intended by the parties as a payment, so far as the plaintiff was concerned. The trial court did not find there was an assignment of the note to Ballah, but gave him a lien in the amount of the note inferior to that of plaintiff. This may have been proper relief in equity. No objection was

made to it. We are of opinion that the defendant Ballah was not entitled to a *pro rata* share of the proceeds of sale on foreclosure; nor to have his lien, if any, equal in priority to that of plaintiff.

At the time of the sale of the land the plaintiff held some unexpired insurance upon the buildings, including the one destroyed in the wind-storm, and attempted to sell the insurance to the purchaser. Ballah, who negotiated the purchase, declined to buy, as he wrote insurance himself. When the building was destroyed the plaintiff interviewed the insurance agent, who advised him that nothing could be recovered because the building had been too long unoccupied and because of the change of title. Whether this would have been a good defense or not, plaintiff, under the circumstances, owed no duty to either of the defendants touching the insurance.

On examination of the testimony, we are of opinion that the court did not err in the credit allowed on interest as found in the decree.

AFFIRMED.

HAMER, J., not sitting.

BRIDGET MCNEA ET AL., APPELLANTS, V. JOHN MORAN ET AL., APPELLEES.

FILED JULY 3, 1917. No. 19603.

1. **Witnesses: COMPETENCY.** In an action involving title to real estate the wife, whose husband claims ownership as purchaser under an oral agreement, is not an incompetent witness to a conversation had between her husband and the vendor, since deceased, in which she took no part.

2. **Specific Performance: PAROL CONTRACT: EVIDENCE.** "The law is well settled in this state that an oral agreement to convey real estate will be specifically enforced where the evidence of such agreement is clear and satisfactory, and the plaintiff has fully performed on his part." *Harrison v. Harrison*, 80 Neb. 103.

3. **Equity: LACHES.** One in possession of land may rest in security until his title or possession is attacked, and a failure to appeal to equity during that period will not prejudice his right either to quiet his title or to assert an equity against the holder of the legal title.

APPEAL from the district court for Kearney county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Lewis C. Paulson, C. F. Shaver, G. N. Shaver and *J. H. Robb,* for appellants.

J. L. McPheely, contra.

CORNISH, J.

On July 29, 1913, Patrick Moran died, leaving as heirs three brothers, three sisters, and three children of a deceased sister. He held title to 480 acres of land. This action is for partition. The controversy is over the ownership of 240 acres of the land, claimed by John Moran, one of the brothers, and a defendant in this action, under an alleged oral contract of purchase, made February 10, 1905, the consideration therefor being services rendered for 20 years prior thereto, work of John and children on the farm, board and care given Patrick, and payment by John of a $1,000 mortgage, then existing on the farm. John asks that title be quieted in him. The trial court found in favor of John and quieted title in him. Certain of the other heirs have appealed.

John sought to show on the trial that immediately after purchasing the land he took possession, improved it, and held open and adverse possession thereof for over nine years and up to the time of Patrick's death; that he paid the $1,000 mortgage and fully performed the contract on his part.

An extended discussion of the testimony is not necessary. Patrick was an old bachelor. He homesteaded in 1876. In 1885 John, with his wife and the two children then born, came west from Ohio, and they all lived together until Patrick's death. The other heirs lived in Ohio and Ireland.

While there may be some room for doubt, we are convinced that the agreement, which John alleges, was made and carried out, all save the making of the deed. John took the land, fenced it, kept the crops, paid the taxes, and was understood to own it. The testimony of the members of his family, showing the details of the transaction from numerous conversations; the payment of the $1,000; Patrick's statement to the assessor that John owned it; his statements to the church committee; to the banker who paid taxes for them; to the carpenter who built a house on Patrick's land; to Frank Stenson who wished to trade for part of the land; all to the same effect, do not leave much room for doubt as to Patrick's understanding. Such being the situation, title should be quieted in John.

Complaint is made that the trial court submitted questions of fact to the jury. Courts of equity can do this for the judge's enlightenment. On appeal the case is tried in this court *de novo*.

Error is assigned in permitting John's wife to testify to conversations had, not between the deceased and her, but between the deceased and John, which she overheard. Such evidence is admissible under the Code. *In re Estate of Powers,* 79 Neb. 680; *Holladay v. Rich,* 93 Neb. 491.

John had been in possession of the land with Patrick as tenant before the agreement of purchase. It is urged that there is not competent evidence to show John's possession, or improvements, or payments, made under the oral contract, to take it out of the statute of frauds, and cases are cited bearing upon that question. Where the evidence of such oral agreement is clear and satisfactory, and the purchaser has fully performed on his part, the contract is no longer within the statute of frauds, and cases, bearing only upon what possession, what improvement, or what part payment will be sufficient to take the case out of the statute, are not in point. *Harrison v. Harrison,* 80 Neb. 103.

It is urged that the oral agreement is not clearly and satisfactorily shown. As applied to the evidence of some of the witnesses, members of his family, this is true. It is

not true, however, of the evidence as a whole. In considering this question of fact, it is proper to take into consideration, not only the evidence of the agreement, but the acts performed under it, and the declarations of Patrick regarding the ownership of the land in controversy. *Harrison v. Harrison, supra.*

The plaintiff invokes the rule denying relief in equity because of unreasonable delay, citing *Bradley & Co. v. Union P. R. Co.*, 76 Neb. 172, and other cases. These are cases where the rule was applied to stale claims of parties, not in possession, seeking specific performance. The general rule and the one applicable here is that one in possession of land may rest in security until his title or possession is attacked, and a failure to appeal to equity during that period will not prejudice his right either to quiet his title or to assert an equity against the holder of the legal title. 16 Cyc. 174. When Patrick Moran learned that his brother John was treating the land in controversy as his own and claiming it, the duty was on him to make a timely assertion of his rights, if John's claim was unfounded.

For the reasons herein given, the judgment of the trial court is

AFFIRMED.

HAMER, J., not sitting.

FRANK MORRIS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19144.

1. **Railroads: INJURY TO OCCUPANT OF AUTOMOBILE: CONTRIBUTORY NEGLIGENCE.** Under the circumstances in this case, one who by invitation rode in an automobile driven by another and remained in it, with knowledge that it was approaching a dangerous railroad crossing, without requesting the driver to stop or to take other necessary precautions to avoid danger, was guilty of contributory negligence, and cannot recover for personal injuries sustained from colliding with a passing train, even though no signal by the locomotive bell or whistle was given.

2. ———: CARE REQUIRED AT CROSSINGS. "It is the duty of a traveler upon a public highway when approaching a railroad crossing to exercise ordinary care, and if he fails to do so and is injured at the crossing by a collision with an engine, and his failure to exercise ordinary care contributed to such injury, he cannot recover therefor." *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627.

3. ———: ACCIDENT AT CROSSING: RECOVERY: PROOF. "To recover for an injury alleged to have been sustained at a railroad crossing by a collision with an engine on account of the neglect of the railroad company to cause a bell or whistle to be sounded as its engine approached such crossing, it is not enough for the injured person to show that he was injured at the crossing, and that no signal of a bell or whistle was given, and that such default of the railroad company was negligence; but, to recover, the injured person must further show that the default and negligence of the railroad company were the proximate cause of the injury sued for." *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627.

4. ———: ———: ———: ———. The testimony examined, and *held* that plaintiff is not entitled under the law to recover for personal injuries sustained.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Reversed.*

E. E. Whitted and *J. L. Rice*, for appellants.

J. G. Thompson and *John Everson, contra.*

DEAN, J.

This is a companion case to the personal injury action of *Askey, Adm'r, v. Chicago, B. & Q. R. Co.*, *ante*, p. 266. This case and the *Askey* case grew out of the same accident, but were tried to a jury separately. In the present case plaintiff recovered judgment for $5,000 for personal injuries he sustained. From this judgment an appeal has been prosecuted.

The facts that are discussed in the *Askey* case that may be necessary to consider in arriving at an understanding of the present case need not be here repeated. At the time of the accident plaintiff's party was riding in a Ford automobile owned and driven by Thomas Askey. He was seated beside the driver in the front seat on the right hand side, that being the direction from which the train came

with which the automobile collided. The train came from the west and the automobile was going south. It appears that plaintiff was 30 years of age and Mr. Askey was about 35, and that the hearing and the eyesight of both were good. He said he was acquainted with the vicinity where the accident occurred, and that he had once lived about 3½ miles from that point, and he also testified that he crossed the track there three times in an automobile on the day of and shortly before the collision, the last time being only 20 minutes before it happened, and on one or more of these occasions plaintiff himself drove the car.

Mr. Morris says that the automobile was running at the rate of about 12 or 15 miles an hour, and that when they approached the railroad crossing he looked along the track to the east, but that he could not see to the west, the direction from which the train came, on account of some trees that obstructed the view, and that when he first saw the train coming the car in which he and his party rode was about 20 or 30 feet from the railroad track, and immediately he started to jump out of the machine, and got as far as the running board or fender. From the rate of speed at which the automobile was traveling, as testified by plaintiff, it may be inferred from the testimony that, if plaintiff had been in a normal condition, he could have induced his companion either to slow down or stop the machine, or that he could have jumped from the car in any event in time to save himself. With respect to the time when plaintiff first saw the train he testified: "Q. What did Mr. Askey do, if anything, when you saw the train? A. He says, 'My God, there is a train.' Q. What did he do? A. Well, he started to—the last I seen of him he was stooped over."

One of the main questions to be determined in the present case is whether plaintiff is chargeable with or shared the negligence and carelessness imputed to the administrator's decedent in the *Askey* case. In this case, as in the *Askey* case, the testimony shows that considerable quantities of intoxicating liquor had been consumed by plain-

tiff and some of his companions on the afternoon in which the accident occurred and shortly prior thereto, but it is not deemed necessary to discuss here that feature of the case, for reasons already given.

That plaintiff's carelessness and negligence in the premises contributed to his injury is fairly deducible from the record. Even though he was not driving the machine, it was his duty to look and listen where looking and listening would have been effective and where he knew there was danger. In a case of like import it was said by Kirkpatrick, C., in *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Neb. (Unof.) 67: "The opportunities for observation of plaintiff were equal, if not superior, to those of her husband, who was driving the team." In the present case plaintiff was not charged with the responsibility of driving the automobile. His opportunity to be on the lookout for impending danger at a place he must have known to be dangerous was therefore perhaps better than that of the driver. Knowing the vicinity and the railroad crossing as he says he did, it was plainly his duty to use every reasonable effort to induce the driver of the automobile to slow down or to stop the machine if the view of the track was obstructed. It is not shown in the record before us that he cautioned the driver about impending danger before they reached the track where the collision occurred, nor that he made any attempt to induce his companion to slacken the speed of the car or to stop.

Plaintiff cites *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426, but it does not appear to support his contention. In that case it is shown, in an opinion by Letton, J., that plaintiff's decedent attempted to seize the arm or the reins of the driver, seemingly in the endeavor to prevent the team from crossing the track in front of the locomotive.

In *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, the court gives this rule: "One riding in an automobile by invitation of the owner and driver, with whom he sat on the

front seat, equally with such driver was required to exercise care for his own safety, and where without objection or protest he permitted the driver to negligently drive upon a railroad crossing immediately in front of an approaching train without stopping to look or listen, exercising no care on his own part to ascertain whether the crossing was safe, although the view of the track was obstructed until they reached a point only a few feet distant, he is chargeable with negligence contributing to his own injury by the striking of the car by the train, and cannot recover therefor from the railroad company."

Rebillard v. Minneapolis, St. P. & S. S. M. R. Co., 216 Fed. 503, is a late case, wherein the court say: "The rule that the negligence of the driver of a conveyance will not be imputed to a passenger, whether the conveyance is a public one or the passenger is the guest of the driver of a vehicle, does not apply where the passenger has full knowledge of the danger and voluntarily incurs the risk."

Omaha & R. V. R. Co., v. Talbot, 48 Neb. 627; *Bush v. Union P. R. Co.*, 62 Kan. 709; *Willfong v. Omaha & St. L. R. Co.*, 116 Ia. 548; *Dean v. Pennsylvania R. Co.*, 129 Pa. St. 514; *Warth v. Jackson County Court*, 71 W. Va. 184; *Brickell v. New York C. R. Co.*, 120 N. Y. 290. The foregoing cases substantially support the rule that is adhered to in this opinion.

In view of the record, we find that the verdict of the jury is not supported by the evidence, and the judgment of the trial court is therefore reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., and ROSE, J., dissenting.

LETTON, J., not sitting.

WILLIAM H. MCELWAIN, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JULY 10, 1917. No. 19231.

1. **Carriers:** TRANSPORTATION OF LIVE STOCK: CLAIM FOR DAMAGES: NOTICE. Where the bill of lading provides that, as a condition precedent to the right to recover "damages for loss of or injury to" live stock, the shipper shall give notice in writing of his claim therefor, notice is not required where the claim is solely for damages sustained by the loss of a favorable market and for shrinkage in weight and expense of feeding at destination while awaiting the next market; such damages being caused by reason of delay in transportation.
2. ———: ———: DELAY: BURDEN OF PROOF. Where there is proof that an unreasonable time was consumed in transporting the shipment, the burden is on the carrier to prove that the delay was not caused by its negligence, though the owner of the live stock accompanied the shipment. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166, distinguished.
3. **Evidence:** OPINION OF WITNESS: SHRINKAGE OF LIVE STOCK. Opinion testimony of qualified witnesses that cattle held at destination two days before selling will probably shrink in weight 3 per cent. may be admissible to prove a claim for shrinkage after arrival, where the weight of the cattle on arrival at destination and before watering and feeding and their selling weight tend to show that the cattle did not "fill" the usual amount. *Underwood v. Chicago & N. W. R. Co.*, 100 Neb. 275, distinguished.

APPEAL from the district court for Merrick county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Edson Rich, A. G. Ellick and *Martin & Bockes*, for appellant.

Elmer E. Ross and *Prince & Prince, contra.*

LETTON, J.

Plaintiff recovered judgment for damages caused by delay in the transportation of live stock, and defendant appeals.

Defendant contends that the instructions ignore the following provision of the bill of lading: "The said ship-

per further agrees that, as a condition precedent to his right to recover any damages for loss of, or injury to, any of said stock, he will give notice in writing of his claim therefor to some officer of said carriers, or to their nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock, and present a formal statement of his claim duly verified to said carriers within 60 days thereafter."

Plaintiff concedes the validity of this provision, but contends that it is not applicable to claims for damages not accruing during transportation. In the petition it is alleged that, if there had been no delay in the transportation, the cattle would have arrived in Chicago in time for the market of Monday, December 2; that owing to the negligence of defendant they arrived there too late for the Monday market; that there was no satisfactory market Tuesday for the class of cattle which plaintiff had shipped, and the cattle were sold Wednesday for less than plaintiff would have received had they arrived Monday. He claims damages for the loss of the Monday market, for shrinkage in the cattle while in the stock-yards from Monday afternoon until Wednesday, and for feeding expense for the two days.

Provisions in a bill of lading, in cases where there is a reasonable doubt as to their meaning, are to be construed most strongly against the carrier. 10 C. J. 181, 194. Was plaintiff required by the provisions of the bill of lading to give notice of his claim? The following statement of the law is pertinent to this inquiry:

"If because of wrongful delay the shipment sustains physical injury, and in consequence a depreciation in value, a provision in the contract of shipment requiring notice of claim for damages for loss or injury to the shipment is applicable. * * * On the other hand, it is very generally held that a stipulation for notice of this character applies only to a loss of, or physical injury to, a shipment of dead freight, or to injury to a shipment of

live stock caused by delay and consequent depreciation in value. In other words, where the shipper suffers special damages because of wrongful delay, no compliance with the stipulation is necessary to entitle him to recover for special damages, and the reason is that the notice would be useless in determining the amount of such loss. In conformity with this principle, it has uniformly been held that a stipulation that notice of damages should be a condition precedent to recovery for any injury to the shipment during transportation has no application to damages caused by the loss of market, to loss resulting from a decline in the market value of the shipment, or to the expense of feeding stock, resulting from delay in transportation. And no notice is necessary to authorize the recovery of damages from shrinkage resulting from the holding of the cattle after transportation was completed, due to the loss of market. * * * Nevertheless, it has been held that, where the provision requiring notice is not confined to loss of, or injury to, live stock covered by the contract, but expressly includes damages for delay, it must be construed as including a loss sustained by a decline in the market, and that a provision in a bill of lading to the effect that claims for loss, damage, or delay must be made in order to render the carrier liable was not limited to claims for damages to the goods shipped." 10 C. J. 334.

Plaintiff's claim was not a claim for "damages for loss of, or injury to," the stock, and notice was not required by the bill of lading. *Gault v. Atchison, T. & S. F. R. Co.*, 92 Kan. 464; *Elliott v. Chicago, M. & St. P. R. Co.*, 38 S. Dak. 371.

It is also contended that instructions relating to the burden of proof are erroneous. After instructing that, in order to recover, plaintiff must prove by a perponderance of the evidence that "an unreasonable delay in the transportation of said cattle occurred on account of the negligence and carelessness of defendant or connecting carriers, and without fault of the plaintiff," the court also instructed that, "when the evidence discloses that an un-

reasonable length of time has been consumed in the transportation of live stock, and the carrier seeks to justify the same, then as to such justification the burden of proof devolves upon it to show by a preponderance of the evidence that said delay in transportation was not caused by its own carelessness or negligence." Defendant argues that, since the owner accompanied the shipment, the burden is on him to prove that the loss complained of was occasioned by the carrier's negligence. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166. In the case cited it was held that, "where by contract the shipper accompanies his live stock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained was occasioned by the negligence of the carrier," and a judgment against the carrier was reversed, since there was no competent evidence tending to show that more time was consumed in transporting the shipment than was reasonably necessary. The instruction assailed does not conflict with the rule announced in the foregoing case. Where the evidence shows that an unreasonable time was consumed in transporting the shipment, the carrier will be liable for resulting damages, whether the shipper did or did not accompany the shipment, unless it is shown that the delay was within the exceptions qualifying the carrier's general liability, the cause of the delay being a matter peculiarly within the knowledge of the carrier.

It is contended that the court erred in admitting opinion evidence to prove alleged shrinkage in weight of the cattle while being held at the stock-yards in Chicago. The aggregate weight of the cattle when weighed on the railroad scales on their arrival at Chicago and before watering was 255,200 pounds. Their selling weight Wednesday morning was 256,410 pounds. Witnesses for plaintiff, experienced in the live stock business, testified that the cattle ought to "fill" 3 to 4 per cent. when watered and sold on their arrival. A witness, called by the defendant, who

had been engaged in the live stock business in Chicago for nearly thirty years, on cross-examination and without objection testified to the same effect. There was a conflict in the evidence as to whether cattle held over from Monday to Wednesday under circumstances such as were in evidence would shrink in weight, but the contention of plaintiff is supported by sufficient competent evidence that such cattle would shrink about 3 per cent. in weight. In other words, while the actual weight of the cattle on the cars at destination and their weight when sold two days later might be the same, if properly filled and taken care of, the cattle should weigh 3 per cent. more than when on the cars, the weight when sold in this case being 6,446 pounds less than it would have been if the cattle had filled 3 per cent. on arrival. There is no proof as to the amount of feed furnished during this delay, and it is not contended it was insufficient.

Defendant cites *Underwood v. Chicago & N. W. R. Co.*, 100 Neb. 275, in which it was stated in the syllabus: "The fact that there was a shrinkage of weight must be proved by competent evidence, and cannot be established by mere opinion evidence." This was correct as applied to the facts in that case, but is not correct as a general rule. In that case the weight of the cattle at the point of origin and destination was the same. The selling weight showed that the cattle had filled a little over 65 pounds a head on an average, which met the requirements indicated by the testimony on behalf of plaintiff. Under such evidence, opinion evidence that cattle when held over one day would shrink 30 pounds a head was insufficient to support a finding of such a shrinkage, since the other evidence conclusively showed that there had been no shrinkage. In the present case, since the cattle at destination did not "fill" to the usual amount, it was proper to show by stockmen that cattle being held for two days at destination would probably shrink 3 per cent.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

HAMER, J., dissenting.

I am unable to agree with the views expressed in the majority opinion. In the first paragraph of the syllabus it is held: "Where the bill of lading provides that as a condition precedent to the right to recover 'damages for loss of or injury to' live stock, the shipper shall give notice in writing of his claim therefor, notice is not required where the claim is solely for damages sustained by the loss of a favorable market and for shrinkage in weight and expense of feeding at destination while awaiting the next market, such damages being caused by reason of delay in transportation." The views of the court as expressed in the body of the opinion supports the syllabus. The provision in the bill of lading reads: "The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss of, or injury to, any of said stock, he will give notice in writing of his claim therefor to some officer of said carriers, or to their nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock, and present a formal statement of his claim duly verified to said carriers within 60 days thereafter." It might be all right to hold that notice is not required where the claim is solely for damages sustained by the loss of a favorable market and expense of feeding at the destination, provided the same are caused by an unnecessary delay in transportation. The weight of the cattle immediately upon their arrival at their destination and before eating, drinking and filling to their usual condition, as nearly as may be, would not be their proper weight. The opinion testimony concerning what the cattle would shrink in two days further complicates the matter. There is no proper starting point shown by the evidence in the case. The testimony of the witnesses as to what might be the shrinkage of the cattle in two days gets nowhere. It is a projected view having no relation to the case and no

connection with it. Undoubtedly there was shrinkage during the transportation of the cattle and it was that shrinkage to which the bill of lading refers, but the defendant company could not properly be held liable for that; and that is mixed with the estimated shrinkage of two days, as related by the opinion witnesses, and both kinds of shrinkage are together, that on the trip and that after the cattle arrived at the end of the trip, and therefore they are inseparable, and each by itself is unascertainable. This must have been prejudicial to the interests of the defendant at the time of the trial.

It is without doubt dangerous to the due administration of justice to make claims for damages because of other things than injury to the live stock shipped and then to consider the whole together. Besides no satisfactory reason is offered for not giving the notice. When the cattle arrived at their destination the shrinkage of the trip had occurred and it was then ready to be investigated. The notice should then have been given before the accumulation of further acts to obscure the view of the subject. The weight of the cattle immediately upon their arrival at Chicago and before being fed or watered was 255,200 pounds, and when sold on Wednesday morning afterwards they weighed 256,410 pounds. The opinion witnesses were brought in to show that the weight of the cattle when sold was 6,465 pounds less than it would have been if the cattle had been properly cared for and had been properly filled on arrival. The problem presented was incapable of exact demonstration, and no one may know that this testimony enabled the court to reach a correct result. It is conceded in the majority opinion that the case cited by the defendant railroad company, *Underwood v. Chicago & N. W. R. Co.*, 100 Neb. 275, was right in that case "but is not strictly correct as a general rule." I think it is preferable to look for a *general rule*. In that case the "fill" is claimed to have amounted on the average to 65 pounds to each steer, and in that case the weight of the cattle at the destination and "point of origin" was the

same, and when the court saw there had been no shrinkage the opinion evidence that the cattle when held over one day would shrink 30 pounds to the head was held insufficient to support a finding of shrinkage in the face of competent evidence that there had been no shrinkage.

FRANK POOS, APPELLEE, V. FRED KRUG BREWING COMPANY, APPELLANT.

FILED JULY 10, 1917. No. 18935.

1. **Master and Servant:** INJURY TO SERVANT: LIABILITY OF MASTER. It is the duty of the employer to furnish his employee with a reasonably safe place in which to work and reasonably safe tools, instrumentalities and appliances to work with. If the employer fails to do this and the employee is injured by reason of such failure, the employer is liable, unless the employee is himself negligent or knows the danger and voluntarily assumes the risk.
2. ———: ———: DUTY OF MASTER: SAFE PLACE TO WORK. If the place to work or the tools or instrumentalities with which the work is to be accomplished are unsafe, it is the duty of the employer to make them reasonably safe, and this is a continuing duty that he cannot avoid. He does not perform this duty by instructing some person or employee to make the place or the instrumentality safe. It is a duty so incumbent upon the employer that he cannot delegate it to some one else and so evade responsibility.
3. ———: ———: NEGLIGENCE OF FELLOW SERVANT. The liability of the employer is determined by the nature of the act in question; and if "the nature of the act in question" establishes that the accident was caused by the negligence of a fellow servant, and not by any defect in the place to work or in the tools or instrumentalities to be used, the employer is not liable.
4. ———: ———: DUTY OF MASTER: SAFE PLACE TO WORK. The employer performs his duty if he furnishes places and appliances that are safe when they are used in the usual and proper way. If such places and appliances are unsafe when safely and properly used, it is the employer's duty to see that they are made reasonably safe for usual and proper use. This is the duty that he cannot delegate so as to relieve himself from responsibility if it is not performed.

5. ———: ———: LIABILITY OF MASTER: ACTS OF FELLOW SERVANT. If the place to work and the tools and instrumentalities with which to work are reasonably safe, the employer is not liable for a misuse of such tools and instrumentalities by a fellow employee who is employed with reasonable care as to his fitness and carefulness.

6. ———: ———: ———. The employer is not liable for anything that he could not avoid by the exercise of foresight and care. He could not anticipate and avoid the negligence of a competent employee.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Former judgment* (no opinion) *vacated, and judgment of district court reversed.*

Nolan & Woodland, for appellant.

Arthur F. Mullen, James E. Rait and *George B. Thummel, contra.*

SEDGWICK, J.

The plaintiff was injured by the falling of a ladder on which he was standing while engaged in his duties as an employee of the defendant company. He brought this action in the district court for Douglas county to recover damages for the injury he sustained in the fall. The jury returned a verdict in his favor for $3,500. The trial court required a remittitur, and entered judgment for $2,500, and the defendant has appealed.

There is but very little, if any, controversy in regard to the facts. The plaintiff has filed three briefs in the case, and from them we learn the following: He was required to "perform certain work connected with alterations to the refrigerating plant. These alterations, as far as need be noted here, consisted of lifting a trap weighing several hundred pounds to its place a few feet below a ceiling 24 feet high. This was done by block and tackle, the chains of which came only within 10 feet from the ground. Ladders were provided for appellee and others doing this work to stand upon when lifting the trap by the block and tackle." One Louis Peitzel was called to hold the ladder for the plaintiff while he was working upon it. The plaintiff

further says: "The ladder was 12 or 15 feet long, with round wooden rungs, and was placed against a round iron post. The floor was of cement, and at that time was slippery because of oil and grease. Appellee's work necessitated his standing upon a rung about 10 feet from the ground, with his back to the post. He could not hold onto the post while working. It was Peitzel's duty to hold the ladder to keep it from slipping while appellee was working, and he did so until appellee was injured. Appellee had ascended the ladder, and was turning around when it turned and threw him to the ground, the ladder falling also. Peitzel was holding the ladder when appellee started to ascend, but released his hold of it before appellee reached the top. * * * The testimony of appellee clearly establishes the fact that he was hurt solely because of the negligence of the man holding the ladder. It was undisputed that it was Peitzel's sole duty to hold the ladder for appellee, and that the ladder could not fall if held, and that it was likely to fall if not held. * * * The fact that the ladder turned, throwing him to the ground, speaks for itself, for, as appellee and appellant's witnesses say, it could not slip if it was held. * * * If appellee's testimony is to be believed, * * * it was the negligence of Peitzel that caused his injuries."

The only proposition of law stated by the plaintiff in his original brief is: "Peitzel's failure to hold the ladder for appellee was a breach of appellant's duty to furnish appellee a reasonably safe place to work, for which appellant is liable." The brief also concedes that Peitzel was a fellow servant: "It is true that Peitzel was, as far as rank goes, a fellow servant of appellee's; but in this instance he was performing the duty of his master." And so the plaintiff himself presents this as a case where the negligence of a fellow servant causes an injury. The plaintiff's contention is that the employer did not furnish him a safe place to work. In the brief it is stated in these words: "Appellee's place was not safe until the ladder was held, and it remained safe only so long as it continued to be

held. Since the law imposes the duty to provide a reasonably safe place for workmen, that duty certainly continues so long as the men are there at work—so long as that place is needed, for their work."

It is the duty of the employer to furnish his employee with a reasonably safe place in which to work and reasonably safe tools, instrumentalities and appliances to work with. If the employer fails to do this and the employee is injured by reason of such failure, the employer is liable, unless the employee is himself negligent or knows the danger and voluntarily assumes the risk. It is equally well-settled law in this state that, if the place to work or the tools or instrumentalities with which the work is to be accomplished are unsafe, it is the duty of the employer to make them reasonably safe, and this is a continuing duty that he cannot avoid. He does not perform this duty by instructing some person or employee to make the place or the instrumentality safe. It is a duty so incumbent upon the employer that he cannot delegate it to some one else and so evade responsibility. He must see to it that the thing is done, and that the place and the instrumentality are made reasonably safe. But the plain question in this case is whether this accident happened because the place or the instrumentality was unsafe, or happened by the negligence of a fellow servant. The plaintiff correctly says in the brief that "the liability of the master is determined by the nature of the act in question." So that the question is, to state it again, whether this accident was caused by some defect in the place to work or in the instrumentality to be used, or was caused by the negligence of the fellow servant. It is said that the ladder might easily be held, and that if it had been held the place to work would be safe, but the employee negligently failed to hold the ladder, and that made the place to work unsafe; that the holding of the ladder was necessary in order to make a safe place to work, and that, as it is the duty of the employer to furnish a safe place to work, it became his duty to hold the ladder, and that he could not delegate that

duty, but must hold it himself, or if he did delegate it he would be responsible as though he were holding it himself.

This sort of reasoning is so emphasized and so much reiterated in the brief, and seems to be so earnestly relied upon, that it may not be useless to suggest some illustrations of such a rule. If two employees to construct a platform to stand upon place two supports under a plank or platform, if these supports are placed at each end of the plank or platform, it will furnish a safe place to work upon, but if one of the employees places a support too far from the end of the plank, his fellow workman may innocently stand upon the unsupported end of the platform and meet with an accident. A platform so unsupported is an unsafe place on which to work. The employer, therefore, by plaintiff's reasoning in this case, has not furnished a safe place on which to work, and his duty to do so cannot be delegated, and therefore he should himself have placed the support under the end of the plank or platform, and is responsible for the fact that a fellow employee misplaced it.

An employee may safely stand upon a wagon to perform services if the wagon is not moved. If horses are harnessed to the wagon and are liable to move it, it might be rendered an unsafe place to work. A fellow workman, as long as he holds the horses and keeps them quiet, therefore furnishes a safe place to work. The duty also would devolve upon the employer, as it is his duty to furnish a safe place to work, and he could not delegate the duty of holding the horses, but would be responsible if the fellow servant left the horses and they moved the wagon and so made the place unsafe to work.

Upon careful examination it will be found that this reasoning can be applied to almost every case where the negligence of a fellow servant has caused an accident.

The employer performs his duty if he furnishes places and appliances that are reasonably safe when they are used in the usual and proper way. If such places and appliances

are unsafe when safely and properly used, it is the employer's duty to see that they are made reasonably safe for usual and proper use. This is the duty that he cannot delegate so as to relieve himself from responsibility if it is not performed. If, however, the tool or instrumentality furnished is in itself safe, and one employee uses it negligently so as to injure his fellow, the employer cannot anticipate or guard against such negligence. The plaintiff concedes this in his brief when he says that the master is not liable "where the place is reasonably safe, but a misuse thereof is made." There can be no possible difference in this respect between the place and the instrumentality with which to work. The plaintiff's brief quotes from *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853, 857, in which it was held that the employer was not liable because "it would create a liability which the master could not avoid by the exercise of any degree of foresight or care." And so in the case at bar the employer could not avoid the negligence of the fellow employee "by the exercise of any degree of foresight or care."

The plaintiff repeats in his brief the statement that because of the situation there was no other way possible to make the use of this ladder safe but by holding it in position, which the fellow employee could easily have done, but carelessly left his duty and allowed the ladder to fall. Surely the employer could not possibly have anticipated such negligence. If there is a defect in the appliance to be used, the employer by proper diligence can ordinarily discover such defect, but he cannot anticipate criminal negligence on the part of fellow employees.

The fellow-servant law has undoubtedly been abused and misapplied, but plaintiff's reasoning would do away with it entirely. It has been so long established and universally acted upon by the courts that, if it is to be abolished and a better rule established in its place, it must be done by the legislature, and not by the courts.

Our former judgment is vacated, and the judgment of the district court is reversed and the cause remanded.

REVERSED.

CORNISH, J., concurring.

Because the master must not negligently fail to furnish the servant with a reasonably safe place to work, and cannot escape liability for the negligence by delegating the duty to another, plaintiff says that when defendant, to keep the ladder from slipping, put a man at the foot of it, he became liable for that man's negligence in failing to hold the ladder. This is a *non sequitur*. Reasoning from a corollary we are liable to fall into error. We need to go back to first principles. Individuals are liable for tort because they have done wrong. In negligence cases the wrong consists in a failure to exercise care. Where the relation of master and servant exists, certain rules based upon human experience and justice define their duties and responsibilities as to each other. Among these is the rule that the master ought to furnish his servant a reasonably safe place to work *in*. This rule never meant that the master must furnish the servant with safe persons to work *with*. The duty is upon him to hire only reasonably careful and competent men. Having furnished such men and a safe place, he has done his duty. Any other rule would be unjust, unworkable, and make the master an insurer against the negligence of others. Having hired competent men, he is not bound to anticipate their negligence. The rule under discussion refers merely to the place or the tool or appliance used—an inanimate object.

As stated in *Mitchell v. Omaha Packing Co.*, 92 Neb. 496, a case cited by plaintiff, the master is liable for the negligence of his agent or servant only when the agent is negligent in the performance of a duty which properly belongs to the master. Applying the rule, it is apparent that the man at the foot of the ladder at the time of the accident was not engaged in constructing, repairing, or in any way creating a place to work in. If the master had told him to secure the foot of the ladder by heavy weights or some other structure, and he had negligently done this, and the plaintiff, not knowing the situation, had received

an injury, then the rule contended for would apply. In such case the master, if necessary, could make a test and know beforehand the real condition; and in such case the plaintiff in using the ladder would have a right to assume that the work had been done carefully. It is to be remembered that the rule does not require the master to change the place or structure or appliance to take the place of workmen where such change is not reasonably required. It is agreed in this case that the ladder with the man at the foot of it constituted a safe place. The plaintiff in his pleading does not allege an unsafe place to work as a ground of negligence, but relies upon the negligence of the fellow servant or man at the foot of the ladder. If the master had placed heavy weights at the foot of the ladder to secure it, and another servant had negligently kicked away one of the heavy weights, all agree that his negligence would not be imputed to the master, and yet the place would have been rendered unsafe. The case above cited by plaintiff illustrates the rule. There, two men were, in their ordinary work, admittedly fellow servants. The master deputed one of them to fix a runway for emptying cinders. He negligently used an old door to stand on in emptying a wheelbarrow. The other servant, not knowing the situation, was injured. The master was held liable. That clearly was a case of unsafe "place to work." This rule is old in the law, and the decisions have always been as above indicated. There appears to be no decision to the contrary.

The main case relied upon by plaintiff is *Czapinski v. Thomas Furnace Co.*, 158 Wis. 635. Consideration of this case only proves the rule. A man was engaged in piling slag iron. A grab attached to a crane would drop, pick up the iron and convey it to another place. The appliance was defective and the master knew it. It would not always empty the small pieces of iron. To avoid this danger the master ordered the servant operating the crane to see to it that the grab in its movements would not get over the man at work. The servant negligently failed to do so

and a piece of iron fell and injured the worker. The master was held liable, but why? The court based its decision solely upon the ground of the defective appliance used that rendered the place unsafe and not at all upon the negligence of the servant operating the crane. The court said that the negligence of the man operating the crane—a fellow servant—may have and did concur in the negligence of the master in using a defective appliance and that in such case of concurrence the master would be held liable on account of his own negligence.

If we were to hold that wherever men are working together on the same job and one from the nature of his work is charged with care to save his fellow workman from the incidental risks of injury and is negligent in that particular, the master is liable, we would then go contrary to the decisions and would virtually obliterate the fellow-servant rule.

Nearly every occupation has its peculiar risks of accident. Men voluntarily entering them must assume whatever risks are reasonably necessary. A casual view of the industrial field will show how frequently this is the case where men work together. Men engaged together loading or unloading heavy material, building scaffolding, building walls, handling explosives, driving a team, automobile, or locomotive, operating the engine or motor that controls connected machinery, holding the horse while it is hitched or shod, digging a well, cooking a meal, have more or less responsibility to keep the place safe for others.

Sometimes it happens that more men are needed to make the place safe. If the master employs the number reasonably required for that purpose he has done his duty and in such case, has never been held liable for their negligence.

Plaintiff's position would seem to be contrary to another rule as to liability, namely, if the risk of danger was as obvious and well known to him as to the master, he assumed it if he continued at the work without making complaint.

ROSE, J., dissenting.

In my judgment the law controlling the decision should be announced as follows: It is the nondelegable duty of the master to exercise reasonable care to provide a reasonably safe place to work and to furnish reasonably safe and suitable appliances, and if he undertakes to perform that duty through another he acts at his own risk, and this rule may be applied where the master delegates to an employee the duty of holding a ladder when that act is essential to the safety of another employee required to work thereon as a part of a permanent plan of operation.

The action is one to recover damages in the sum of $10,000 for personal injuries alleged to have been sustained by plaintiff while in the employ of defendant, December 21, 1913. Defendant at the time was installing an ice machine. Plaintiff and other employees, by means of blocks and chains, were raising pipes 20 feet above the floor in the engine room of defendant's plant. The chains could not be reached from the ground and were operated by plaintiff and others from ladders. Six feet or more above the floor, plaintiff, in performing his duties, stood on a 14-foot slanting ladder with the lower end on a slippery cement floor and the upper end against a cylindrical iron column. This was a safe place to work when the ladder was held in place, but otherwise it was unsafe. Plaintiff, who had been transferred from another department, had no part in selecting the ladder or in placing it in the position indicated. It was the duty of Louis Peitzel, another employee, to hold the ladder, and, solely through his negligence in failing to do so, it slipped, turned, and threw plaintiff on the concrete floor. These facts are pleaded in the petition. In the answer it is alleged that the injury to plaintiff was caused by his own negligence, that he had assumed the risk incident to the use of the ladder, and that Peitzel was a fellow servant. From the judgment on a verdict in favor of plaintiff for $2,500, defendant has appealed.

Defendant challenges as erroneous an instruction containing the following language:

"As before stated, it was the duty of the defendant to exercise ordinary care to furnish a reasonably safe working place for plaintiff in which to work, and reasonably safe instruments and appliances with which to do his work. * * * You are therefore instructed that, should you find from a preponderance of the evidence that in the exercise of ordinary care, in order to furnish a reasonably safe working place in this instance and reasonably safe instruments or appliances with which plaintiff was required to perform his work, it was necessary to have some one hold the ladder in question while plaintiff was mounted thereon, and should you further find from the evidence that Louis Peitzel was the person delegated to perform said duty of holding said ladder in position, * * * and should you further find from a preponderance of the evidence that said Louis Peitzel was negligent in the performance of said duty, * * * then you are instructed that such negligence of Louis Peitzel would be the negligence of the defendant herein."

In regard to this instruction plaintiff seems to take the position that his injury resulted from the failure of Peitzel to perform for his employer the nondelegable duty to provide a reasonably safe place to work, the only negligence in that respect being the failure to hold the ladder. On the other hand, it is argued that Peitzel was a fellow servant, for whose negligence defendant is in nowise answerable. On appeal it is conceded: "(1) That the defendant placed Peitzel at the foot of the ladder with instructions to hold it steady when the plaintiff was upon it. (2) That Peitzel's sole duty was to hold the ladder for the plaintiff while he was on it. (3) That the ladder could not fall while Peitzel held it. (4) That Peitzel was, as far as his rank goes, a fellow servant of the plaintiff."

The evidence supports a finding that Peitzel neglected to hold the ladder while plaintiff, free from negligence on his part, was on it in the performance of his duties. In that position no degree of care on the part of plaintiff

would have made the place safe without some one to hold the ladder. Plaintiff was not required by his employment to make the ladder secure for his own protection. Plaintiff, who had been transferred from another department, had no part in selecting the ladder or in placing it in the position indicated. Its use in the manner indicated was not a temporary makeshift. It was intended to be thus used throughout the operations connected with the raising of pipes in the engine room. The unperformed duty was the exercising of reasonable care to provide a reasonably safe place to work. This was the obligation of the master. The law requires him to perform that duty. If he undertakes to perform it through another he acts in that respect at his own risk. The duty cannot be shifted by the mere employment of animate means. In holding the ladder, a nondelegable duty under the facts of this case, Peitzel acted for his master, though in other respects he and plaintiff may have been fellow servants.

Defendant argues, however, that it had performed its legal duty when it provided a safe ladder and selected a competent servant to hold it, and contends: "Where a master instructs a servant to work upon a ladder, and instructs a fellow servant to hold that ladder, and that fellow servant is competent, and the ladder is safe and sound and sufficient for the purpose for which it is employed, and the servant is in a 'safe place' so long as the fellow servant at the foot of the ladder performs his duty, is the master responsible for the consequences of the negligence of such fellow servant in releasing his hold upon the ladder, permitting it to slip, and causing the plaintiff to fall, on the theory that the fellow servant at the foot of the ladder is performing a nondelegable duty inasmuch as he is maintaining a 'safe place?' "

The argument is formidable, but not conclusive. It was defendant's duty to exercise reasonable care to provide a reasonably safe place to work and to furnish reasonably safe and suitable appliances. *Parker v. Omaha Packing Co.*, 85 Neb. 515; *Johnson v. Model Steam Laundry Co.*, 88

Neb. 12; *O'Dell v. Stewart & Co.*, 96 Neb. 147; *Union P. R. Co. v. Broderick*, 30 Neb. 735. The duty was a continuing one. *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249. The duty was nondelegable, and, if the fellow servant to whom it was delegated was negligent, defendant may be liable. *Mitchell v. Omaha Packing Co.*, 92 Neb. 496. It is not material whether the injury is considered as a result of a breach of the duty to provide reasonably safe appliances or of the duty to provide a reasonably safe place to work. 3 Labatt, Master and Servant (2d ed.) p. 2392; 4 Labatt, Master and Servant (2d ed.) p. 4465. Defendant's argument is based on the premise that the ladder was a suitable, safe and proper appliance for the purpose for which defendant had directed it to be used. The petition alleged, and the proof justifies a finding, that the ladder was not in itself a suitable, safe and proper appliance, and that it was unsafe for the purpose for which it was being used unless it was held by another employee—an unperformed duty of defendant. In holding the ladder for the purpose of providing a reasonably safe place to work Peitzel was performing a nondelegable duty of his employer. His negligence was therefore attributable to defendant. The rule is: A master using a defective appliance cannot escape liability for injury to a servant therefrom by instructing or making it the duty of another servant to use it in a manner which will prevent the defect from causing injury, since the duty to furnish reasonably safe appliances is nondelegable. *Czapinski v. Thomas Furnace Co.*, 158 Wis. 635.

This doctrine seems to be founded on reason and justice. It is in harmony with the trend of modern legislation and judicial thought. In the adoption of the view of the majority the mission of the law has failed.

NEILS JOHNSON ET AL., APPELLANTS, V. LEROY T. PETERSEN ET AL., APPELLEES.

FILED JULY 10, 1917. No. 18896.

1. **Evidence**: HEARSAY: EXCEPTIONS. Declarations derogatory to the title of an ancestor, made by him after he transferred title, are not admissible as an exception to the hearsay rule merely because the grantee acquired the property without a monetary consideration. *Johnson v. Petersen*, 100 Neb. 255, overruled.
2. ———: ———: DECLARATIONS. Declarations against the pecuniary interest of the declarant when made may be admissible after his death as an exception to the hearsay rule.
3. ———: ———: EXCEPTIONS. While the entire statement made in connection with a declaration against the interest of the declarant may be admissible as an exception to the hearsay rule, such parts as are not against his pecuniary interest may be entitled to little credit, where the evidence shows that in those respects he had strong motives for misrepresentation.
4. **Trusts**: CONSTRUCTIVE TRUSTS: PURCHASER IN GOOD FAITH. Trust property conveyed by a trustee *ex maleficio* to his prospective wife in consideration of marriage cannot be followed by the *cestui que trust*, where the grantee acquired title in good faith without knowledge or notice that the property was purchased by her grantor with trust funds.

Opinion on motion for rehearing of case reported in 100 Neb. 255. *Former judgment vacated, second paragraph of syllabus overruled, and judgment of district court affirmed.*

CORNISH, J.

This action was begun by the heirs of Lena Petersen, first wife of Soren T. Petersen, deceased, and who died in 1875 without issue, to enforce a trust in the property in controversy, because it was purchased with the proceeds of a converted draft, Lena Petersen's share in a legacy. The defendants are the children of the deceased and his second wife, Maren, now Mrs. Hansen. Defendants contend that the beneficiaries of the trust cannot follow the property, even though so purchased, because it had been

conveyed by Petersen to his second wife (their mother) in 1876 in consideration of marriage, and because in divorce proceedings in 1892 between their mother and Petersen the property was ordered conveyed to their children, the defendants. The trial court dismissed the action, and plaintiffs appealed. In this court the judgment was reversed and title to the property quieted in plaintiffs. *Johnson v. Petersen,* 100 Neb. 255.

Upon motion for rehearing the defendants contend that this court erred in its consideration of the declarations of Petersen, made after he had conveyed the property, and in the rule announced in the second paragraph of the syllabus as follows: "In a suit to declare a trust in lands, the declarations of the ancestor through whom the defendants acquired title, without the payment of a monetary consideration, may be received in evidence against the defendants who stand in the place of the ancestor."

The declaration referred to is evidenced by oral testimony and by a letter written by the declarant just before he died, as follows:

"Omaha, Nebr., June 6, 1912.

"Nels Johnson, Hombolt, Iowa:

"I thought best to write you a letter, as I don't tink my time is long for this world. If I know that time you was her I would had a talk with you. I anderstant you was here to investigat the mony which Lena got from her ant. As I haven't long to live I will tell you about it. I got the money to week after Lena was dead in 1875. I tout it was all right, so I bought lot 13—20 Nelson's addition on which I built 3 houses, No. 975, 979, 971 North 27 street, Omaha, Nebr. I got the money in a draft to which I had to sign Lena name. The Duth (Dutch) concil said it would be all right so long as she was dead she could not do it. I did not write you that time as I did not know your address. I did not want to part with it, but the law say I must. That dam bich of a woman beat me out of it so I had to sumit. The property is now in possession of four children, namely Leroy Petersen, Leona McCutchen, Lillian Deitrick and

one what goes by the name of Emilie. She don't be long to me. I will send this to my Brother to send to you after my death, so you will know when you get this I will be with Lena. Now I think I am square with the world and hope for rest.

"(Signed) S. T. Petersen."

Under our system of jurisprudence, hearsay testimony is not generally admissible in evidence. An exception to this rule, based upon the principle of experience, is that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false, or heedlessly incorrect, and, being thus sufficiently guaranteed, is admissible in evidence, though oath and cross-examination are wanting; the witness being unavailable because of death.

One of the applications of this exception to the general rule is that which permits declarations derogatory to his title of one who at the time holds the title. Or, as stated in negative form in *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887: "The declarations of a former owner of land are not admissible as against those claiming under him when made after he has conveyed the land." The owner of real estate is not likely to make untrue statements in derogation of his title. Declarations derogatory to title, made after parting with title, have not that guaranty of their truth which the law requires; nor does the law recognize that the declaration is more likely to be true if the title has been parted with without consideration, than if the conveyance was for valuable consideration paid. In either case the declaration is ordinarily inadmissible.

The declarations of an ancestor, from whom those claiming title derived their title as heirs, are within the exception to the hearsay rule and are admissible in evidence. The second paragraph of our syllabus, above quoted, is inaccurate in two respects: First, it appears to make the rule depend upon whether the defendants acquired title without payment of a monetary consideration, when, in fact, the character of the consideration does not affect the rule as a rule of evidence. Second, the rule announced is

not applicable to the case in hand. Here, the children did not acquire title as heirs through an ancestor, but through deeds made long before Petersen's death, and the declarations were made after parting with title. Considered merely as declarations derogatory to title, they are inadmissible. The rule announced in the second paragraph of the syllabus, in so far as it is contrary to the law as herein stated, should be overruled.

We are of opinion, however, that the particular declaration under consideration was admissible by virtue of another application of the general exception to the hearsay rule above stated. A declaration, which when made is directly contrary to the pecuniary interest of the person making it, is admissible in evidence. An admission that one has converted to his own use the money of another is within this class. It follows that the declarations of Petersen, stating that he converted the money of his first wife, which, if true, would constitute him a trustee *ex maleficio* of a constructive trust and render his estate liable therefor, are admissible in evidence for what they are worth. For a discussion of the rules of evidence applicable, see 2 Wigmore, Evidence, secs. 1082-1086, and 1457-1461; also, 4 Chamberlain, Modern Law of Evidence, secs. 2769-2774.

Upon further consideration, we are of opinion that the judgment of the trial court must be affirmed for other reasons of law and of fact. Defendants contend that the second wife was a purchaser for value without notice of the trust, and that therefore plaintiffs are not entitled to follow the trust property into defendants' hands. Petersen married his second wife, mother of defendants, September 29, 1876. He executed the deed which conveyed to her the property in controversy September 25, 1876. She testifies that it was conveyed to her in consideration of the intended marriage; that she did not know how Petersen acquired the property. On behalf of plaintiffs, besides Petersen's letter, there was testimony by his third wife that she heard Petersen say that the property was conveyed to

the second wife to protect it from possible creditors of Petersen, and that the second wife knew how he had acquired the property. Nowhere does she testify distinctly as to statements made either by Petersen or his second wife, showing when the wife first knew how Petersen had acquired the property; nor does Petersen in either his letter to Johnson or in the one to his third wife state that his second wife knew of the conversion of the money at the time she accepted the deed. A belief that she did know would rest mainly upon inference and be directly contrary to her sworn testimony. Petersen's declarations, when admitted in evidence, are not of much value for determining the real point in controversy. While his statement as to what he did with the money is probably admissible, as part of his entire statement, yet, considered by itself, that part of it telling what he did with the money is not a statement against interest, but the contrary. Petersen was in the money-lending business, and the evidence would indicate that he was at all times a man of some means. It would be to his interest to have the property, which he had parted with and which finally went to the children, appropriated for what he owed his wife's heirs, instead of being taken out of his own estate. The record, not his statements, shows that the property in dispute was not purchased until nearly a year after he received the money. It is hard to be sure that this particular money went into the particular property in dispute. In his love letter, written to his third wife at about the time he was divorced from his second wife, he speaks of the children (the defendants) as bastards. Afterwards, he seems to have been on friendly terms with one of the boys, but in his last letter, written just before his death, he speaks of Emilie as not his child. His malice and the malice of his third wife toward his second wife and the children are apparent from the testimony. His declarations, in the light of all the testimony, while against pecuniary interest, as above stated, shows generally an unfriendly feeling toward his second wife and family. We are of opinion that they are not suffi-

cient to overcome the testimony of the second wife that she was the *bona fide* purchaser of the property in dispute without knowledge or notice of any fraud upon her husband's part.

It is suggested as something extraordinary for Petersen to deed the property to his second wife just before marriage. We do not think so. It is entirely within the proprieties for a man about to marry a woman to give, and for her to take, in consideration of marriage, the property which is to be their home. If fairly offered in the right spirit, most women would be glad to take it as a proof of affection. Besides, this was Petersen's manner of wooing. In his letter to his third wife, he tells her that, if she will come and live with him, he will give her the old piano, or, if she wishes, buy her a new one. This last letter, written at about the time he was divorced from his second wife, indicates that previous thereto there had existed an improper, if not illicit, relation between his third wife and himself. She did come to live with him, and they sustained illicit relations with each other for several years before their marriage. She afterwards commenced divorce proceedings against him. Neither her testimony nor his statements are entitled to the highest credit. His conscience draws too fine a line. Any friend could have told him that to his wife's people, whose property he had converted, there would be nothing sacred in the particular property in controversy, unless it would be its value. How easy it would have been for him to have taken the other property, which the evidence shows he owned and was worth more than this, converted it into cash, or given it to his wife's heirs. They would have been entirely happy and his conscience quieted. Instead of that, his conscience drives him to go elsewhere for property to pay his wife's relatives what he owes them, even though it forces him to violate the solemn decree of the court in a suit where he was a party, and two solemn deeds of conveyance executed by him.

When Petersen's second wife obtained a divorce from him, the parties agreed to the terms of alimony. The decree awarded to the wife $5,000 and provided that the property now in dispute should be conveyed to the children; the wife to have the custody of the children and the use of the property until the youngest child should become of age, provided that she supported them. One of the grounds alleged by her for a divorce was that he insisted on appropriating the rents received from the property in dispute, although he was worth $40,000. Both of the parties, in conformance with the decree, joined in the deed to the defendants. It is contended by defendants that, the property being awarded in lieu of payments in money, they are in the same position as if they had been awarded money and with the money had purchased the property.

If, at the time the property was deeded to the second wife, she took it in consideration of marriage, and we find that she did, then she would be a *bona fide* holder for value, unless she took it with notice that it was trust property. We find that she did not then know it was trust property. We are of opinion, also, that the deed made by the husband and wife, pursuant to the decree of the court in the divorce suit, constituted the children innocent purchasers for value of the property in dispute. For decided cases bearing upon these questions, see *Leininger Lumber Co. v. Dewey*, 86 Neb. 659; *National Exchange Bank v. Watson*, 13 R. I. 91; *Bowman & Cockrell v. Baker*, 147 Ky. 437; *Sloan v. Coburn*, 26 Neb. 607; *McClatchey v. Anderson*, 84 Neb. 783; *Pottenger v. Bailey*, 8 Ohio Dec. (Reprint) 106; *Ryder v. Ryder*, 244 Ill. 297; *Scheps v. Bowery Savings Bank*, 97 App. Div. 434, 90 N. Y. Supp. 26.

For the reasons given herein, the statement of law announced in the second paragraph of the syllabus of our previous opinion is overruled, and the judgment of the trial court is

AFFIRMED.

MORRISSEY, C. J., and HAMER and DEAN, JJ., dissent.

EMMA L. WATSON, APPELLEE, v. WILBERFORCE W. RILEY ET AL., APPELLANTS.

FILED JULY 10, 1917. No. 19307.

1. **Wills**: CONSTRUCTION: OPTION. An option to purchase property of the estate, whether it be at an appraised value or at a price named or agreed upon, may be created by will.

2. ———: ———: ———: ACCEPTANCE. A will, bequeathing to one of the four children one-fourth of the estate for life, with remainder over to her children, and to each of the other children one-fourth of the estate, concluded with a provision as follows: "It is my will that the said Emma L. Watson (one of the children) shall have the right to take the following described land (here follows description) for the sum of $50 per acre, the said Emma L. Riley (Watson) shall be allowed on the said purchase price of said land the sum of $12.50 per acre or if her bequest shall amount to more than the sum of $12.50 per acre then she shall be allowed upon the said sum of $50 per acre the sum of her entire inheritance to be deducted from said sum of $50 per acre." A codicil contained the following words: "I give and bequeath to my daughter, Emma Watson, the strip (describing a narrow strip) in addition to and as a part of the farm bequeathed to her in the said will, and on the same terms and conditions." Emma accepted the devise and offers to pay to the other heirs the $50 per acre as provided in the will. This offer is declined by the other heirs. Emma brings suit to quiet title. *Held*, that by the acceptance and offer the title to the land vested in Emma, subject to the amount then due from her to the estate.

APPEAL from the district court for Pierce county: ANSON A. WELCH, JUDGE. *Affirmed.*

Kelsey & Rice, O. S. Spillman and *Dowling & Warner*, for appellants.

M. H. Leamy, contra.

CORNISH, J.

Margaret Riley, by her will made February 20, 1906, bequeathed to Mary, one of her four children, "one fourth of all the property, both real and personal, of which I may die possessed;" to Wilberforce, the same; to Alice, the

same for life, with remainder over to her children; to Emma, the same. Then followed the words: "It is my will that the said Emma L. Watson (the child above mentioned) shall have the right to take the following described land (here follows description, 160 acres) for the sum of $50 per acre, the said Emma L. Riley (Watson) shall be allowed on the said purchase price of said land the sum of $12.50 per acre or if her bequest shall amount to more than the sum of $12.50 per acre then she shall be allowed upon the said sum of $50 per acre the sum of her entire inheritance to be deducted from said sum of $50 per acre." Subsequently she made a codicil to her will, as follows: "I give and bequeath to my daughter, Emma Watson, the strip (describing a narrow strip) in addition to and as a part of the farm bequeathed to her in the said will, and on the same terms and conditions."

Although, at the time the will was made, $50 per acre may not have been far from the value of the land, it is now worth about $150 per acre. The controversy, an action to quiet title, is over Emma's claim of right to the land at $50 per acre, under the will. The other heirs, defendants, contend that the will shows the primary intent of the testator to be an equal division of her property; that, if she had intended to limit the price of the land, she would have devised it to plaintiff and provided that she pay a certain amount to each of the other children; that, if Emma's claim is right, then each is not getting one-fourth of the property, in fact, according to the terms of the will, but one-fourth of a fictitious or arbitrary estate; that the figures given in the last paragraph are illustrative of or a formula for distribution only, and were not intended to cut down or limit the estate which she was giving to the other three children; that the will had two main purposes, one, an equal division, and the other, to give Emma an opportunity to take the home farm; and that the last clause of the will, above quoted, is ambiguous.

We are of opinion that this contention is erroneous. In the first place, it is impossible to say that the primary ob-

ject of the will was an equal division of the property amongst the children. Why did she limit Alice's share to an estate for life? People make wills to avoid equal division. The law does that without a will. The main object of a will is likely to be a purpose that, to strangers, may seem unfair. Mrs. Riley's moving purpose may have been to secure the homestead for Emma, at $50 per acre. Quite likely it was. That is the last clause in her will. Again, the argument proves too much. It renders nugatory this last clause, for, if the property is to be divided according to its value, that can only be determined by its highest selling value, and Emma has no preference over anybody else.

The argument that, if the testator wished to prefer Emma, she would have devised the land to her, charged with the portions going to the others, is unsound in this: Such was not her will. In such case, Emma *must* take or the will fails. She wished rather to give Emma the option to take, and expressed her wish in language clear enough. Of course, she had the right to prefer Emma if she wished. The defendants argue that at the time she wrote the will she considered $50 per acre a fair estimate of the land's value. Let us suppose that is true. Then her will is consistent throughout. But, it may be said, she was mistaken, or did not anticipate a subsequent raise in price. Perhaps so. Prices might have gone down.

Is it still insisted that, if she had known, she would have had it otherwise, in order to accomplish an equal division? Well, if so, we will give you the short answer, advised by Chancellor Kent in such cases: *Voluit sed non dixit.* (She wished but said nothing.) Margaret Riley's case may have been, probably was, a very common one. She regarded her children equally, and would so divide her property; but yet she was attached to the old homestead, which bore the family name, did not wish it divided, or to go into the hands of strangers, and for some reason wished Emma to preserve it for family uses. So she gave Emma that privilege, honestly valued the land at $50 per acre, and in

that way made an equal division. Such cases are numerous.

The courts unanimously and without disagreement have held according to the rule stated in 40 Cyc. 2000: "An option to purchase property of the estate, whether it be at an appraised value or at a price named or agreed upon, may be created by will." The rule is recognized in *Fauber v. Keim,* 85 Neb. 217. Deny the testator that power, and he could not make his real will. He may have the best of reasons. One piece of property—a store or a farm—may be adapted to the use of a particular child. He wishes to hold it intact and to avoid controversy over its value; and, more important still, he may desire to make a preference. His valuation must go in the distribution, and, if on his valuation the distribution is equal, then it is so in law, and there is no fictitious estate or repugnancy in the will. The writer knows of one will where no doubt the testator, dividing his property equally, thought his valuation on the homestead, bequeathed to one, might be from $5,000 to $10,000 too low. It turned out to be $5,000 too high. Testators know that conditions and their valuations will change, but that is their business. It generally happens. We know of no case, however, where the courts have permitted changed valuations to affect the will. The reason is that the intent must be drawn from the clear language of the will. Results, full of mischief, will follow when courts, not testators, make the will.

Johnson v. Johnson, 81½ Pa. St. 257, was a case very like the one in hand. There the testator, as here, divided his real property equally among his 12 children. He valued it at $6,000, and gave three sons the privilege of taking it at that price. The real estate became worth from $50,000 to $70,000. The court, without dissent, sustained the provisions of the will.

In the case in hand, the codicil to the will should remove any doubt about its proper construction. There Mrs. Riley herself interprets the will as if it bequeathed the land to Emma upon certain terms and conditions. The real cause

of the controversy in this case grows out of the increased value of the land since the time when the will was made. If the land value had remained at $50 per acre, or gone below that amount, there would have been no dispute. Once we fully and fairly recognize the right of the testator to fix the valuation of his property, bequeathed for distribution, then the will presents no difficulty of construction. Strictly speaking, the present value of the land is a matter with which the court has absolutely nothing to do, any more than it has to do with evidence bearing upon the testator's affection for the several children. When the language is clear, the will speaks for itself. There is no ambiguity in the will.

The judgment of the trial court should be affirmed. Emma having elected to purchase the land at $50 per acre, title should be quieted in her, subject to the amounts due the other children, in accordance with the provisions of the will.

AFFIRMED.

DEAN, J., concurring separately.

An option to buy real or personal property at a given price is everywhere recognized as a property right. It is so recognized in the law that pertains to the interpretation of wills. Mrs. Riley in express and coldly specific terms devised to her daughter Emma an option to purchase the home place at the price of $50 an acre. Her will also provides that Emma's distributive share in the land, $12.50 an acre, "shall be allowed on the said purchase price of said land." The language of the codicil, as pointed out in the main opinion, seems to emphasize the specific intent of Mrs. Riley with respect to the disposition that she wanted to make of her home place. The testatrix might have provided that Emma's option to purchase should be based on an agreement as to price, or upon an appraised value of the land at the time the will became effective. But it is sufficient answer that she did not do so. She named the price. The will does not appear to be ambiguous, and

we should not declare it to be so upon slight pretext. As said by Chief Justice Cooley in *Kinney v. Kinney,* 34 Mich. 250:

"Where there is no ambiguity on the face of a will, it is not admissible by extrinsic evidence to seek to raise an ambiguity, and thereupon on the strength thereof to limit or qualify the construction of the language actually used, so as to give effect to some conjectured probable purpose of the testator which he has failed to express. This would be not putting a construction upon the will made by him, but making a new one of quite a different purport. * * * Judicial tribunals cannot inquire into a testator's hopes and expectations as to what his fortune may turn out to be when his will shall take effect, any further than he has seen fit to express them; where he has clearly expressed a wish consistent with the rules of law, they must give it effect; they are not at liberty to surmise that his real wishes were something different."

Nothing can be more clear than the language of Judge Cooley on this point. The rule in the *Kinney* case must be adhered to, if men and women are to be left free to make their own wills. It is elementary that, where there is an apparent conflict in the language of a will having to do with both general and specific devises, the general devise yields to the specific. The rule is the same where a will, or even a contract, has to do with a general intent and a particular or specific intent. In such case the specific intent controls. In the present case it is argued by defendants that, if it is held that the will discloses two conflicting intents, namely, an intent to divide all of the property equally among the four children and an intent to give to Emma an option to buy the home place at $50 an acre, the intent for an equal division controls. The question, then, is squarely presented as to which is the controlling intent or paramount purpose that is disclosed by the language of the will. Clearly, if there is such conflict, the intent of the testatrix to give to Emma the option to purchase controls, because the language of the will pertaining thereto

is specific as to person, as to property, and as to price. In this respect all is distinct, all is clearly pointed out. It seems to be the uppermost, the controlling, thought of Mrs. Riley, and appears perhaps to be the main reason why the will was at all written. The clause of the will devising to Emma the option to purchase the farm, and the codicil which gave to Emma the strip of land that formed an essential part of the farm, "in addition to and as a part of the farm bequeathed to her in the said will, and on the same terms and conditions," are the sole and only portions of the will that point out and specify and distinguish any portion of the estate from the general mass of the estate. This seems to answer the contention that the will of Mrs. Riley gives expression to conflicting intentions with respect to the disposal of her property. The will does not seem to present intentions that are in substantial conflict, when viewed in the light of generally accepted rules of construction.

The specific devise is favored by our statute for certain purposes. Section 1318, Rev. St. 1913, provides: "The estate real or personal, given by will to any devisees or legatees, shall be held liable to the payment of the debts, expenses of administration, and family expenses, in proportion to the amount of the several devises or legacies, except that specific devises and legacies, and the persons to whom they shall be made, may be exempted, if it shall appear to the court necessary in order to carry into effect the intention of the testator, if there shall be other sufficient estate."

Ogilvie v. Ogilvie, 21 Quebec Sup. Ct. 130, holds: "The fact that the estate is much larger at the date of the testator's death than it was when the will was made is an extraneous circumstance which cannot be taken into account by the court in the interpretation of a will, so as to change its meaning from that fairly deducible from the contents of the entire instrument itself."

Will any one deny the validity of a clause in a will that places a valuation upon property for purposes of distribu-

tion? Will it be denied that an option to purchase property on terms and at a price specified in a will is not the subject of lawful testamentary disposition? The main opinion seems fairly to have gathered from the will of Mrs. Riley her intent with respect to the disposition that she wanted to make of her property. With this done, the duty of the court is accomplished. Where the language of the will is plain, it is not within the province of the court to go outside of the will to discover intent. Death will have an added terror when the judge begins to substitute his will for the will of the testator.

SEDGWICK, J., dissenting.

The office of the court in such case is to determine the meaning of the will; that is, the true intent of the testatrix. The case of *Fauber v. Keim*, 85 Neb. 217, cited in the majority opinion, also depended upon the intention of the testator, and it was said: "The decision on this point must be controlled by the intention of testator as disclosed by his entire will." This is the only respect in which that case is similar to the one at bar, and I must suppose, that it was cited for that purpose, as this is the only suggestion in the majority opinion that we should ascertain the controlling desire and intention of the testatrix from the consideration of the entire will. In considering the will for that purpose, we must also consider the conditions under which it was executed and the surrounding circumstances. "Every will should be interpreted, as far as possible, from the standpoint apparently occupied by the testator; and attendant circumstances, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration, as part of the *res gestæ*, where the language is not plain nor the meaning obvious." 1 Schouler, Wills (5th ed.) sec. 466. The case of *Johnson v. Johnson*, 81½ Pa. St. 257, is also cited; but it appears to be fundamentally different from the case at bar. In that case the testator estimated the value of his real estate and specifically bequeathed that much money to his children, "to share

like and like (naming the children) each $500;" that is, he willed to each of his children $500 in money, and the will did not purport to give the land to any one except those particularly specified, to whom the court gave the land. The majority opinion says: "Strictly speaking, the present value of the land is a matter with which the court has absolutely nothing to do, any more than it has to do with evidence bearing upon the testator's affection for the several children." This seems to be an unusual statement, since all of the authorities agree, as above suggested, that in determining the meaning of a doubtful will the court must take into consideration the "evidence bearing upon the testator's affection for the several children." It may well be conceded that in like manner the court should take into consideration the present value of the land. The land, and its condition, and its value were circumstances to be considered, not only its supposed salable value at that time, but its potential value, and evidence that it increased in value very rapidly is evidence of its potential value at the time of the making of the will, a matter which the testator was at liberty to take into consideration, or a substantive fact that the testator might at the time have overlooked And so the present value of the land becomes an important circumstance.

Of course, where there is no ambiguity on the face of the will, extrinsic evidence is not proper to raise an ambiguity. The question in this case is whether there is an ambiguity on the face of the will; if not an ambiguity, an inconsistency. That depends upon the language of the will and the facts relating to the property which was the subject of the will. If the existing facts relating to the property which was the subject of the will show an ambiguity or inconsistency in the will, it seems to be proper to consider those facts and determine whether or not there is such an ambiguity or inconsistency that both of the supposed wishes of the testator cannot be enforced. If there is, then we must enforce the predominant and controlling one. The fact that the land has increased in value since

the will was made cannot change the meaning of the will from that "fairly deducible from the contents as a whole;" but "the meaning fairly deducible from the contents of the whole instrument" is the very question we are discussing. If the will was perfectly plain in those respects, and stated that Emma should take the property at the value of $8,000, then the fact that the property was altogether worth $24,000, instead of $8,000, would make no difference. Shall Emma have seven times as much as any of the others? Was that the intention of this will taken altogether? This land was the substance of the property willed. The personal property was of so little value that its consideration will not affect the result. There is no doubt but the desire and intention of the testatrix was to give each one of these four children one-fourth of all of her property of which she might die possessed. This she has expressly and explicitly done in the will. After having done this, she expresses a wish that her daughter Emma shall be allowed the right to take the farm at $50 an acre, which she evidently supposed was its value at the time. If the will had then become effective, it would have accomplished the desire of the testatrix, and would have contained no inconsistency; but it did not become effective until several years later, and then that each of these children should have one-fourth of the property of which she died possessed, and that Emma should have the farm at $50 an acre, was impossible. Feeling confident, as she did, that $50 an acre was at that time the real value of the land, the expression of her wish that Emma should have it at $50 an acre was equivalent to saying that she should have it at its real value, so far as the effect upon the devisees in general was concerned. There is, of course, no doubt that the testatrix might create by will "an option to purchase property of the estate, whether it be at an appraised value or at a price named or agreed upon." It was wholly unnecessary to cite authorities and discuss this proposition at length. It will also be conceded that the testatrix in this case used language which amounts to an attempt to so create an option which would without

hesitation be enforced, if that could be done without doing violence to the principal purposes of the will.

Whether the two provisions of the will under consideration are inconsistent and incapable of enforcement as literally stated in the will is not much discussed in the majority opinion. The second paragraph of the syllabus recites some of the facts quite at length, and determines arbitrarily upon the recited facts that Emma must have the bulk of this property; but that paragraph of the syllabus does not clearly disclose any proposition of law upon which it is so determined, and I do not clearly understand what the view of the majority is upon the vital proposition of law in this case. The thought that there is an inconsistency in the will was evidently in the mind of the writer of the opinion when he used this language: "She regarded her children equally, and would so divide her property; but yet she was attached to the old homestead, which bore the family name, did not wish it divided, or to go into the hands of strangers, and for some reason wished Emma to preserve it for family uses." Here it is assumed that she would have divided the property equally if she could, and at the same time have the property preserved for family uses; whereas, by the express language of the will, she did divide the property equally, and did give each of the four children one-fourth thereof as it might be at the time of her decease, and only expresses a wish that Emma might take the land at what she supposed at the time of making the will was its real value. The opinion assumes that the wish to preserve the land for family uses was the principal purpose of making the will, and says: "People make wills to avoid equal division. The law does that without a will." But there is a legal presumption, when there are no circumstances to indicate the contrary, that the testator desired an equal distribution of his property, and "in case of doubt a construction of the will, as to property, which conforms most clearly to the general statutes of descent and distribution should prevail." 1 Schouler, Wills (5th ed.) sec. 479. The opinion asks the question, "Why did

she limit Alice's share to an estate for life?" This may have been a leading reason for making the will, but it does not make the division of the property unequal. She divided the property into four equal shares, and gives a share to each of her children *per stirpes*. The fact that she desires that Alice's share shall be preserved for Alice's children throws no light upon the question here considered.

It is said in the opinion that "the codicil to the will should remove any doubt about its proper construction." This is because "Mrs. Riley herself interprets the will as if it bequeathed the land to Emma upon certain terms and conditions." The codicil provides that the easement of a passageway to the land shall go with the land upon *"the same terms and conditions."* The sole purpose of this codicil was to attach the passageway to the land as a part thereof, and the fact that the testatrix took this (probably unnecessary) precaution can be of no assistance in construing the will. This codicil amounts to no more than to say that, if the conditions are such that she gets the land, she shall have the right of way to the land upon the same terms. There is no evidence in the record indicating any motive or reason for any unequal division of the property. By the majority opinion Emma gets about seven times as much property of the testatrix as does any other of the four children. I cannot see how this will can be construed to express such an intention of the testatrix.

MORRISSEY, C. J., concurs in this dissent.

HAMER, J., dissenting.

The testatrix was the owner of a certain small amount of personal property at the date of making the will, February 20, 1906, and she also owned a quarter section of land, and a strip of land two rods wide, used as a private road and running to the farm. There were 160 acres in the quarter section, and two acres in the strip, making a total of 162 acres. She had four children, Mary Millett, Wilberforce W. Riley, Alice Dean, and Emma L. Riley

(Watson). At the time of her decease the personal property, after the payment of a few small debts, amounted in value to only about $1,000. The real estate was then worth $150 an acre, according to the evidence, and amounted to $24,300. As there is no controversy about the $1,000 of personal property, that need not be considered in this discussion. The testatrix was apparently desirous at the time of making the will of dividing all her property evenly between her children, giving one-fourth to each, but at the same time she desired that in the division Emma L. Riley (Watson) should be allowed, at her election, to take the farm, instead of her one-fourth in money. Emma L. Riley (Watson) elected to take the farm, and so notified the other children in writing. The evidence that the testatrix desired to evenly divide the property between her children is shown by the devising and granting clause contained in each of the second, third, fourth, and fifth paragraphs of the will. The first reads as follows: "I give and bequeath to my daughter, Mary Millett, one-fourth of all the property, both real and personal, of which I may die possessed." The second devising and granting clause in the third paragraph of the will reads: "I give and bequeath to my son, Wilberforce W. Riley, one-fourth of all the property, both real and personal, of which I may die possessed." The third devising and granting clause contained in the fourth paragraph reads: "I give and bequeath to my daughter, Alice Dean, one-fourth of all the property, both real and personal, of which I may die possessed, to have and to hold for her use and benefit for her natural life and upon her death to be divided among the children of the said Alice Dean share and share alike." This gives to Alice Dean a life estate in the one-fourth of all the property, with remainder over to her heirs. The fourth devising and granting clause contained in the fifth paragraph reads: "I give and bequeath to my daughter, Emma L. Watson, one-fourth of all the property, both real and personal, of which I may die possessed."

After this part of this last clause comes in this fifth paragraph some peculiar provisions that do not seem to be quite consistent with other parts of the will and (if properly a part of the will) are perhaps not quite consistent with each other. They are not a part of the devising and granting clause. They come afterwards. They are that Emma L. Riley (Watson) may purchase the land if she so elects, and it is said: "The said Emma L. Riley (Watson) shall be allowed on the said purchase price of said land the sum of $12.50 per acre (which would be one-fourth of the price of each acre valued at $50 per acre) or if her bequest shall amount to more than the sum of $12.50 per acre then she shall be allowed upon the said sum of $50 per acre the sum of her entire inheritance to be deducted from said sum of $50 per acre."

The first clause of the language quoted might seem to show that Emma L. Riley (Watson) was not expected to pay anything on the one-fourth of each acre that she would inherit under the law; that the land was to be treated under the will as if she had inherited one-fourth of each acre, and was to receive one-fourth of each acre without paying anything for it; and the second clause shows that it was in the mind of the testatrix that it was uncertain what would be the amount of the bequest coming to Emma L. Riley (Watson). The words, "Or if her bequest shall amount to more than the sum of $12.50 per acre," clearly implied the uncertainty in the mind of the testatrix as to what might be the amount of the bequest. There could be no uncertainty concerning this matter if the price of the land was to be regarded as fixed at $50 per acre for the entire tract. It would be 50 times 162 or $8,100. The uncertainty was certainly there, or the writer of the will would not have given expression to it. Of course, the writer of the will must be presumed to have expressed the purpose of the testatrix, unless the contrary appears from the language of the will, the number of the devisees, the property devised, and its entire value. Could this have been the intent, first, that Emma L. Riley (Watson)

should not be obliged to pay for the one-fourth of the real estate which she would inherit under the law or take in any event under the will, if she took the land, or its value if she did not take it? Her bequest as to dollars and cents would be much greater if the land should be sold and she got one-fourth of the purchase price. This indicates that the testatrix expected the land to be sold and to get more than $12.50 per acre for her one-fourth. If the majority opinion is finally sustained, it renders absolutely nugatory the whole disjunctive clause which we have quoted. In that event, that clause in the will is without a purpose. It puts in a sentence which has no meaning, and, notwithstanding the four separate devising and granting clauses by which there is bequeathed and devised to each one of the heirs "one-fourth of all the property, both real and personal," of which the testatrix "may die possessed," yet the last child named, Emma L. Riley (Watson), is to be given 162 acres, worth $150 per acre, as set forth by the evidence, and for the price of $50 per acre only, provided the statement as made in the will is held to be equivalent to a devise. The majority opinion in that event would confer a license upon the testatrix to say one thing in the will and to mean another, and enable Mrs. Watson to enforce that which the testatrix did not say and did not intend to say.

It will be noticed that the peculiar clause in the will is not contained in the devising or granting clause. There is nothing in this clause which proposes to give the land to Emma L. Riley (Watson). She merely says in the instrument: "It is my will (my preference) that the said Emma L. Watson shall have the right to take the following described land." All that she says is that she prefers that Emma L. Watson shall have the right to take the land. But she does not devise the land to Mrs. Watson. The most that she does is to express a willingness to allow her to take the land; but, of course, at the time she executed the will she did not know whether she would take the land or not, and this part of the will is the expression

of a preference that she shall be allowed to take the land. It is merely the statement of a wish. If Mrs. Watson should prefer to take her share of the money instead of the land, there is nothing whatever in the will to prevent her from doing so. Nor should the will have greater force than the testatrix intended it to have. She did not unqualifiedly say that in any event Mrs. Watson shall have the land; but she said in effect that she might purchase it, and in that connection she said that if she did purchase it she "shall be allowed on the said purchase price of said land the sum of $12.50 per acre." Here is undoubtedly the statement indicated that the land might be sold for its reasonable market value, and, if it did sell for that, then that Mrs. Watson's interest in the land should be considered paid for up to the amount of $12.50 per acre. The fair implication is that, if the land is sold, Mrs. Watson should only have credit upon the purchase price at the rate of $12.50 per acre. The purpose was to protect Mrs. Watson and to give her the share of the land which she did inherit under the law. She did, of course, inherit one-fourth of it. But there was no purpose to say that the land should not be purchased at its fair market value. One-fourth of the land was hers under the law. It was not contemplated that this would be changed. It is difficult to understand how the land could be "purchased," unless a price was agreed upon between her and the other heirs. If I purchase a thing I agree upon the price with those who have the article to sell. That is what Mrs. Watson was expected to do. There is no meaning otherwise in the provision that she should purchase the land. There could be no "purchase price of said land," unless Mrs. Watson agreed with the other heirs concerning what the price should be. Nor is there seemingly any reason in the provision, "or if her bequest shall amount to more than the sum of $12.50 per acre then she shall be allowed upon the said sum of $50 per acre the sum of her entire inheritance to be deducted from said sum of $50 per acre." The testatrix was saying to herself: "The bequest cannot exceed

$12.50 per acre, because that is one-fourth of the value of the land now at the time of the execution of the instrument; but, if it brings more at the sale after my death, then my bequest should amount to more than the sum of $12.50 per acre." Of course, it would amount to more than $12.50 per acre if at the time of the sale it is worth $150 per acre. The scrivener did not fully express the thoughts in the mind of the testatrix. It is unreasonable to suppose that she would three times say that she intended to give each of these heirs "one-fourth of all the property, both real and personal, of which I may die possessed," unless she meant it. She intended an agreement as to the value of the property on the sale of the property. She intended to be fair with her children. The property has increased $100 an acre in value. The majority opinion would give Mrs. Watson $100 an acre on 162 acres of land. The proposition is to give her this increase in value without consideration, $16,200. To do this is to disregard the apparent intention of the testatrix as expressed in the four devising and granting clauses of the will, and is also to disregard the disjunctive clause quoted.

That part of the will contained in the fifth paragraph below the devising and granting clause is the mere expression of a wish. It is "precatory." I will say by way of illustration that it is not every condition in a will that is to be carried out; "and if such condition prove illegal or incapable of performance, whether as against good morals, or as impossible under any circumstances, or as rendered impossible in the particular case and under the existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect." 1 Schouler, Wills (5th ed.) sec. 599. See *Conrad v. Long*, 33 Mich. 78; *Parker v. Parker*, 123 Mass. 584; *Shepard v. Shepard*, 57 Conn. 24; *In re Greenwood*, 1 L. R. Ch. Div. 1903 (Eng.) 749. In the same section (sec. 599, *supra*) it is said: "A court of equity may, and frequently does, relieve the donee from embarrassing conditions which turn out harsh, impossible, and unconscionable."

In *Conrad v. Long, supra,* there was a devise to Frederick S. Conrad upon condition that the sister, Elizabeth Long, continued to live with her husband, Henry Long, as his wife. In case she ceased to live with her husband as his wife, then the will gave her one-half of the property devised. In an action of ejectment it was held that the condition in the will was contrary to public policy and void, and that Elizabeth Long took her share of the property clear of any conditions. In *Parker v. Parker, supra,* it was made a condition of the will that the devisee, Loring Parker, should exercise guardianship over the son of the testator, George Parker, who was an idiot. George Parker died two days before the death of the testator. He was unmarried and without issue. The testator left no widow. It was held that the devisee, Loring Parker, was relieved from the performance of the condition in the will, and that he held the land by an absolute title.

To say, "It is my will that the said Emma L. Watson shall have the right to take the following described land (describing it) for the sum of $50 per acre," she to be "allowed on the said purchase price of said land the sum of $12.50 per acre," is to use language described in the books as "precatory." It was not imperative. It was the mere expression of a wish, a preference. She would like to have it done, but did not make it a part of the devise. Where a testator wrote a codicil to his will which concluded, "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary," the court held that the option was not illegal; but, the wife having dissented, probate of the will was refused. 1 Schouler, Wills (5th ed.) sec. 293. It was said in a note to the section: "The least a court can do in such a case is to promptly decree probate of the will after the testator's death, without waiting for any later contingency to be determined, and leave its further operation to a court of construction." The testatrix did not attempt to make it imperative that Mrs. Watson take the land. In the instant case the taking effect of the codicil should be made to depend upon whether

the option to take the land by Mrs. Watson was (1) contained in a devising or granting clause, and therefore was a devise or grant, and (2) was exercised by her. It was not a devise or grant because not in such a clause; nor could it be known before the construction of the will that the heir named would elect to take the land. (3) A fair construction of the intent of the testatrix would require that the devisee named should purchase the land at its fair market value. In *Coffman v. Coffman,* 85 Va. 459, 17 Am. St. Rep. 69, 2 L. R. A. 848, it was held that, where a man made a will, so called, which purported to exclude a certain son from participating in his estate at his death, yet made no disposition of the property, there was no will, and the deceased had died intestate, and that the son was entitled to his share.

"The cardinal rule of testamentary construction, * * * is that the plain intent of the testator as evinced by the language of his will must prevail, if that intent may be carried into effect without violating some deeper principle of public policy or of statute prohibition." 1 Schouler, Wills (5th ed.) sec. 466.

"Every will should be interpreted, as far as possible, from the standpoint apparently occupied by the testator and attendant circumstances, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration, as part of the *res gestæ,* where the language is not plain nor the meaning obvious." 1 Schouler, Wills (5th ed.) sec. 466. *Smith v. Bell,* 6 Pet. (U. S.) *68; *Blake v. Hawkins,* 8 Otto (U. S.) 315; *Brown v. Bartlett,* 58 N. H. 511; *Eidt v. Eidt,* 127 N. Y. Supp. 680 (will dictated to an unskilled scrivener just before testator underwent a serious surgical operation); *Cornet v. Cornet,* 248 Mo. 184; *Moore's Estate,* 241 Pa. St. 253; *Will of Ehlers,* 155 Wis. 46.

"The moulding or altering must be in furtherance of the purpose expressed or indicated in the context." 1 Schouler, Wills (5th ed.) sec. 477. *Acton v. Lloyd,* 37 N. J. Eq. 5; *Merrill v. Webster,* 187 Mass. 652.

Of course, this is saying that such changes may be made.

"If any word or expression has no intelligible meaning, or is absurd, or repugnant to the clear intent shown in the rest of the will, it may be rejected." 1 Schouler, Wills (5th ed.) sec. 478. *Bartlet v. King,* 12 Mass. 537; 1 Jarman, Wills (6th ed.) 480; *Needham v. Ide,* 5 Pick. (Mass.) 510; *Holmes v. Cradock,* 3 Ves. Jr. (Eng.) *317; *Davis v. Boggs,* 20 Ohio St. 550.

"Nor is a clear gift or devise in one part of the will to be cut down or out by indefinite, doubtful, or ambiguous expressions in another part, or upon any conjectures." 1 Schouler, Wills (5th ed.) sec. 478. 1 Jarman, Wills (6th ed.) 479; *Price v. Coles' Ex'r,* 83 Va. 343; *Meyer v. Cahen,* 111 N. Y. 270; *Hochstedler v. Hochstedler,* 108 Ind. 506; *Bruce v. Bissell,* 119 Ind. 525; *Robinson v. Finch,* 116 Mich. 180; *Pitts v. Campbell* 173 Ala. 604; *In re Randall's Will,* 137 N. Y. Supp. 319; *In re Boulevard,* 230 Pa. St. 491.

"Against the fundamental maxim that the intention of the testator shall prevail comes in conflict another primary one, namely, that the heir at law shall not be disinherited by conjecture, but only by express words or necessary implication. * * * Hence, in case of doubt a construction of the will, as to property, which conforms most clearly to the general statutes of descent and distribution should prevail." 1 Schouler, Wills (5th ed.) sec. 479. *Pendleton v. Larrabee,* 62 Conn. 393; *Geery v. Skelding,* 62 Conn. 499. The above language clearly suggests an even division of the property.

"Among one's legitimate and legitimized offspring, American policy favors the presumption that no one shall be favored above the rest, but all shall share equally in the parent's bounty, unless, of course, the will in question clearly shows a different intention." 1 Schouler, Wills (5th ed.) sec. 481. "So, too, a clause will be read so as to be consistent, if possible, with the testator's evident in-

tent and avoid uncertainty." 1 Schouler, Wills (5th ed.) sec. 488.

Because of all the reasons which we have given, it would seem that Mrs. Watson, the plaintiff, should not be allowed to recover. The will was executed in February, 1906. Mrs. Watson brought her action to quiet title in February, 1914. The testatrix died July 9, 1913. It is alleged that the will was admitted to probate on the 6th day of December, 1913. In the time that elapsed between the execution of the will and the decease of the testatrix conditions were much changed. The value of the land was at least three times as great as at the time of the execution of the will. It is not equitable to give this land to Mrs. Watson at the expense of the other heirs.

In Thompson, Wills, sec. 339, it is said: "Where a testator desires his devisee or legatee to benefit some third person out of the estate given, he frequently expresses his desire by words of entreaty, expectation, request, recommendation, hope, wish, desire, and the like, rather than by words of command. Such expressions in wills are termed 'precatory words.'" *Burnes v. Burnes,* 137 Fed. 781; *Kauffman v. Gries,* 141 Cal. 295; *Seymour v. Sanford,* 86 Conn. 516; *Bryan v. Milby,* 6 Del. Ch. 208, 13 L. R. A. 563; *Hartman v. Armstrong,* 59 Kan. 696; *Murphy v. Carlin,* 113 Mo. 112, 35 Am. St. Rep. 699; *Hunt v. Hunt,* 11 Nev. 442. While in the text trusts are referred to, the language used is "precatory," and means the same thing in its application to wills. In the same section of Thompson, Wills, it is said: "Where a clear discretion and choice to act, or not, is given, equity will not construe a trust from the language employed." *McDuffie v. Montgomery,* 128 Fed. 105; *Giles v. Anslow,* 128 Ill. 187; *Fullenwider v. Watson,* 113 Ind. 18; *Bills v. Bills,* 80 Ia. 269, 8 L. R. A. 696, 20 Am. St. Rep. 418; *Bowen v. Dean,* 110 Mass. 438; *Clay v. Wood,* 153 N. Y. 134. Of devises and bequests it is said in the same section: "Words of desire, request, recommendation, or confidence in a will, addressed by a testator to a legatee whom he has the power to command, create no

trust in favor of the parties recommended, unless (1) the intention of the testator to make the desire, request, recommendation, or confidence imperative upon the legatee, so that he shall have no option to comply or to refuse to comply with it, clearly appears from the whole will and the relation and circumstances of the testator when it was made, (2) unless the subject-matter of the wish or recommendation is certain, and (3) unless the beneficiaries are clearly designated. When these three conditions exist, a precatory trust may be raised." *Burnes v. Burnes,* 137 Fed. 781; *Colton v. Colton,* 127 U. S. 300; *Lines v. Darden,* 5 Fla. 51; *Hunter v. Stembridge,* 12 Ga. 192; *Peake v. Jamison,* 6 Mo. App. 590. In the same section it is said: "It is well settled that the words used must be essentially imperative in their character to create a trust." *Bristol v. Austin,* 40 Conn. 438; *Hayes v. Hayes,* 242 Mo. 155; *Sturgis v. Paine,* 146 Mass. 354.

In conclusion, I desire to say that, if the purpose of the testator is to be interpreted from what she said in the four separate paragraphs of the will containing devising and granting clauses, then the action of the plaintiff should fail. If the law of descent and distribution of property is to prevail in the construction of the will, then the plaintiff should not be allowed to recover. I know of no legal or equitable reason which permits the plaintiff to obtain a judgment quieting title to the premises.

PHILLIP H. GAMMEL V. STATE OF NEBRASKA.

FILED JULY 10, 1917. No. 20054.

1. **Criminal Law**: INSTRUCTIONS: UNCHASTITY. The defendant was convicted of committing rape upon the person of Hazel Gammel, alleged to be under the age of 15 years and not previously unchaste. The testimony with respect to her age was conflicting, that of the state tending to show that she was then about two months under the age of 15, while that of the defendant tended to show that she

was then between 16 and 17. There was also testimony on the part of defendant which renders it doubtful that she was chaste at the time when the alleged offense was charged to have been committed. *Held*, that it was error to refuse to give instruction numbered 6, requested by defendant, that is set out and discussed in the opinion.

2. ———: PRELIMINARY EXAMINATION: PLEA IN ABATEMENT. Where the transcript of the record in justice court shows that a person who is accused of felony has had or waived a preliminary examination, and it is contended that in fact no such examination ever took place, the absence of such examination should be raised by a plea in abatement.
3. **Rape**: CORROBORATIVE EVIDENCE. "The testimony of the prosecuting witness alone will not support a conviction of the crime of rape. Her testimony must be corroborated by other evidence." *Fitzgerald v. State*, 78 Neb. 1.
4. ———: ———. "The unsupported testimony of a prosecutrix that the crime with which a defendant is charged was repeated subsequent to the alleged commission of the principal offense is not corroborative of the testimony of the prosecutrix as to the commission of the offense charged." *Boling v. State*, 91 Neb. 599.

ERROR to the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

Joseph E. Daly, for plaintiff in error.

Willis E. Reed, Attorney General, Charles S. Roe and *J. C. Cook, contra.*

DEAN, J.

Phillip H. Gammel, aged about 65 years, was convicted in the district court for Dodge county of the crime of rape upon the person of Hazel Gammel, charged in the complaint as being under the age of 15 years and not previously unchaste. The trial proceeded to verdict and judgment of conviction, and, defendant being unable to procure a supersedeas bond, he was lodged in the penitentiary, there to serve a sentence of 12 years. He has brought the case here alleging that he did not have a fair and impartial trial, and that there are other errors in the record entitling him to a new trial.

Defendant's plea of "not guilty" was withdrawn, and he filed a motion to quash the information, for the alleged

reason that he neither had nor waived a preliminary examination. The motion alleged that the error complained of appeared on the face of the record, and that the case therefore came within the provisions of section 9084, Rev. St. 1913: "A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged."

The transcript of the proceedings before the justice of the peace on this feature of the case contains the following recital: "Now on this 13th day of October * * * said defendant was arraigned in open court and entered a plea of guilty to the first, second, third, fourth, fifth, and sixth counts of said complaint and to said complaint as a whole. It was therefore considered and adjudged by me that said defendant be held for trial to the district court of Dodge county, Nebraska, at the present term thereof."

This court has held that, where an accused person is brought before an examining magistrate and voluntarily pleads that he is guilty of the crime charged against him, he thereby waives his right to preliminary examination. *Latimer v. State,* 55 Neb. 609.

At the trial the justice testified, in substance, that when the complaint was read to defendant in his court he answered, "I plead guilty, but I am an innocent man," and that the county attorney then said to him: "That doesn't go. I have got to have from you, Mr. Gammel, a plea of guilty or not guilty; which is it?" To which defendant responded: "I plead guilty, but it is all wrong." The deputy sheriff testified on cross-examination that he understood from the defendant's statements that he protested that he was innocent, but that he would "plead guilty to end it all."

The chief of police of Fremont testified on cross-examination: "Q. Do you know the exact words Mr. Gammel used in the matter of his making response when asked to plead to this complaint? A. Yes, sir; I think so. While he pleaded guilty to the complaint * * * as a whole, he

intimated he was innocent, and he wanted to get done with it all and have it over. Q. I don't want the intimation or your understanding of what took place there, I want the exact words, Mr. Peterson. A. I think he said he was innocent, but he plead guilty. Q. And while he pleaded guilty he said he was innocent, did he not? A. Yes. Q. And he said that he pleaded guilty in order that it might be ended? A. Yes, that in substance."

The sheriff testified that when the complaint was read to the defendant he "inferred that he was not guilty." While he denies making any attempt to have the defendant plead guilty to the complaint, he testified on cross-examination: "Q. Well, Mr. Condit, that is a custom of your office, is it not, for you to try and get men that are charged with crime to plead guilty whether they are guilty or not? A. In some cases. Q. Isn't that the custom in all cases to get men to plead guilty when you catch them and they are charged with a crime? A. In some cases it is."

Elsewhere in the record it is shown that in a period of time that is not given, 36 out of 49 persons convicted of a felony in Dodge county pleaded guilty through the efforts of the sheriff.

From the foregoing it does not appear that defendant voluntarily pleaded guilty, and there is no pretense that he waived, nor that he was given, an examination. His answers to the questions propounded to him in the justice court cannot properly be held to be a waiver, nor can they be held to be a voluntary confession. Under the circumstances attending this case, we suggest, but not in the way of criticism, that it would perhaps have been better practice for the examining magistrate to have given to defendant the examination for which the law provides. The preliminary examination is a valuable right given by the law to the accused, and he cannot properly be deprived of that right except by his own voluntary act. It will not be contended by any person that, even though the accused stands charged with one of the most heinous offenses

known to the calendar of crime, he is not nevertheless entitled to a fair and impartial examination and trial.

In the justice court the county attorney, the sheriff, his deputy, and the chief of police were all properly present. The accused does not appear to be learned in the law, and it appears he was not represented by counsel. He seems there to have been confused, whether from fright, or from the enormity of the crime with which he was charged, or because of the alleged abrupt conduct of the officers in whose charge he was, or from some other cause which does not clearly appear. At all events, his plea in the justice court was not apparently the voluntary expression of a normal mind.

There are other substantial errors complained of for which the case must be reversed. In the present state of the record, we do not base the reversal on the ground of a lack or waiver of examination. Defendant should have raised his objections by a plea in abatement as the statute plainly provides.

There is substantial conflict in the testimony with respect to the age of the accusing witness, the state maintaining that, at the time of the commission of the alleged offense, she was about two months under 15 years, while there is testimony of two or more witnesses on the part of defendant that she was then between 16 and 17 years of age. The defendant testified that when he and his wife, who were itinerant evangelists, received her into their family from an orphanage, in December, 1901, that they were informed by the management of the institution that she was then a year and a half old.

There is also testimony in the record which renders it doubtful that the prosecuting witness was chaste at the time of the alleged commission of the offense. On this point defendant requested the following instruction, numbered 6 in the record, which was refused by the court: "The jury is instructed that, where the prosecutrix is over 15 years of age at the time of the alleged commission of the crime, in order to establish the defendant's guilt as

charged, it is necessary for the state of Nebraska to prove beyond a reasonable doubt that the prosecutrix was not previously unchaste."

In view of the conflicting testimony with respect to the age of the prosecuting witness and with respect to previous chastity, the jury should have been instructed upon the points embodied in the requested instruction. If she was over the age of 15 at the time of the alleged crime with which defendant is charged, the burden was on the state to prove beyond a reasonable doubt that the prosecutrix was previously chaste. *Burk v. State,* 79 Neb. 241. The prosecuting witness was interrogated on this point in her direct examination: "Q. Hazel, did you ever have sexual intercourse with a boy or man prior to the time you had this sexual intercourse here? A. No, sir; not here in Fremont. Q. So you will understand me, Hazel, before he had sexual intercourse with you, had you ever had sexual intercourse with any man or boy? A. No, sir; not here in Fremont." She also testified that defendant had no improper relations with her until May, 1916. From the record it appears that several women, who resided in the community where she lived, took a friendly interest in her welfare, and that to all of them she said that no man had ever sought to have improper relations with her. But to a man named Murphy, whom the record shows to have been a furnace tender and chore man about a hotel at Fremont, and who had at one time given to Hazel a bracelet, she confided her story of alleged abuses by defendant. The record shows that for two or three weeks after the death of defendant's wife in May, 1916, he was away from home, and that during this period he left Hazel in the home of a resident of Fremont. She testified that she went to the Gammel home from where she was staying twice each day, accompanied by the lady with whom she was staying, or by her daughter, and that "Mr. Murphy was there several times, and I went there when there was no one there." The prosecutrix, on cross-examination, was asked if she and Murphy were at the Gammel house in the

absence of defendant. To this question an objection of the state was sustained. In view of the surrounding circumstances, the witness should have been permitted to answer. This man Murphy was subpœnaed to appear as a witness, but the sheriff testified that he could not be found. It seems to us almost incredible that a chaste and truthful girl would have first sought out Mr. Murphy for a confidant, rather than some of the many good women who befriended her. A review of the record discloses that the verdict does not seem to be supported by the testimony of any witness except that of the prosecutrix. In this state this is held to be insufficient. *Fitzgerald v. State,* 78 Neb. 1.

Many other errors are complained of, but it is impractical to discuss all of them in the space that should be allotted to this opinion. The errors pointed out were prejudicial to the defendant, and he must therefore have a new trial.

The judgment of the district court is reversed and the cause remanded for further proceedings in conformity with law.

REVERSED.

ROSE, J., dissents.

HAMER, J., not sitting.

The following opinion on motion for rehearing was filed December 1, 1917. *Rehearing denied.*

1. **Criminal Law:** INSTRUCTIONS: REASONABLE DOUBT. In a criminal trial it is prejudicially erroneous to instruct the jury that, if "from a careful consideration of all the evidence and facts and circumstances in proof in the case, or the want of evidence," they "can say that they having an abiding conviction of the truth of the charge made in the information, then they are satisfied beyond a reasonable doubt."
2. **Rape:** CORROBORATIVE EVIDENCE. The facts and circumstances necessary to corroborate the testimony of the prosecuting witness must be proved by other witnesses. The testimony of a prosecuting wit-

ness as to other matters in a criminal trial cannot be held to be corroborative of such witness' own testimony as to the principal fact. *Fitzgerald v. State*, 78 Neb. 1.

DEAN, J.

Upon motion for rehearing and re-examination of the record, we find that the court of its own motion instructed the jury that, if they found from the testimony that the prosecutrix was over 15 years of age when the alleged crime was committed, it would be their duty to acquit defendant. It was therefore not error for the court to refuse to give defendant's instruction No. 6 that is referred to in our former opinion, and the first paragraph of the syllabus is therefore withdrawn as being inapplicable to the facts.

There are other instructions given by the court of its own motion that appear to us erroneous. These doubtless should have been discussed in our former opinion. Instruction No. 11, as given by the court, follows: "The court instructs the jury that 'a reasonable doubt,' as used in these instructions, is such a doubt, in the mind of a thoughtful man, as causes him to stop and hesitate and say, 'I am not satisfied,' when acting with reference to the graver and more important affairs of life. It is not a mere possibility of the innocence of the defendant; but if the jury, from a careful consideration of all the evidence and facts and circumstances in proof in the case or the want of evidence, can say that they have an abiding conviction of the truth of the charge made in the information, then they are satisfied beyond a reasonable doubt and should find the defendant guilty."

In this instruction the jury are informed, among other things and in effect that, if for "the want of evidence" they "can say that they have an abiding conviction of the truth of the charge made in the information, then they are satisfied beyond a reasonable doubt and should find the defendant guilty." It is obvious that the defendant could not be properly convicted for "the want of evidence" that the state failed to produce or that the de-

fendant failed to produce. This instruction, as given by the court, in effect places the burden of proof upon the defendant to establish that he is innocent of the crime with which he is charged, and is therefore erroneous.

In another instruction the court informed the jury that the evidence of the prosecuting witness must be corroborated as to "the principal fact of sexual intercourse," and added: "But the testimony of the complainant as to the commission of the crime by the defendant may be corroborated by evidence of facts and circumstances showing a disposition on his part to commit the crime, and an opportunity to do so." The prosecuting witness testified to various acts of intercourse with the defendant both before and after the act specified in the count of the information upon which the defendant was tried. The defendant requested an instruction that the testimony of the prosecutrix as to the commission of acts of intercourse subsequent to the time when the principal offense was alleged to have been committed would not be corroborative of the testimony of the prosecutrix as to the commission of the offense charged. This request the court refused. It seems clear that in connection with the above instruction given by the court there should have been given one of the nature of the requested instruction. If the jury regarded her testimony of other illicit acts as tending to prove "a disposition on his part to commit the crime" charged, they might erroneously find her testimony as to the principal fact corroborated by these other circumstances testified to by her. The jury should have been instructed that the testimony of the prosecutrix alone should not be considered as corroborative testimony. *Fitzgerald v. State,* 78 Neb.. 1.

For the errors pointed out herein, the application for rehearing must be

DENIED.

ROSE, J., dissenting.

Defendant was convicted of committing a rape upon a female child. I am convinced that the jury based their

verdict alone on proper and sufficient evidence of guilt, and that the instruction technically condemned by the majority did not mislead them or affect their deliberations to the prejudice of defendant.

There is no law in Nebraska requiring corroboration of a prosecutrix to sustain a conviction for rape. The supreme court never had any power to make such a law. Laws binding upon the supreme court in dealing with felonies and the rules of evidence in establishing them may come from three sources of power: (1) Constitutional provisions adopted by the people. (2) Direct enactments of the legislature. (3) The common law of England adopted by legislative enactment. The doctrine invoked by the majority to set aside the conviction of a man accused of committing a rape upon a female child did not come from any legitimate source of power. It is not in the Constitution. It is not in the statutes of Nebraska. It is not in the common law. Obviously its first announcement by this court was an error. Blind adherence thereto should be terminated by a correction of the error. In speaking of the rule followed by the majority, the supreme court of Oklahoma said:

"It is true that there are some decisions based upon special statutes which hold that corroboration of the prosecutrix is necessary, but, in the absence of such a statute in this state, we could not agree to establish a rule so repugnant to justice, constituting such a shame upon our civilization; so insulting to decency and so pregnant with danger to weakness and virtue." *Reeves v. Territory,* 2 Okla. Cr. Rep. 351, 360.

In *Brenton v. Territory,* 15 Okla. 6, 11, the same court said:

"The rule of requiring the prosecutrix to be corroborated in rape cases is followed, it is believed, in but one state and one territory, except where adopted by statute, viz., Nebraska and New Mexico. With criminal procedure acts like ours, the states of California, Florida, North Dakota, and Montana have held that such corroboration is not required, and the same is held by the courts of

highest resort in Alabama, Arkansas, Arizona, Georgia, Illinois, Kentucky, Michigan, Minnesota, Missouri, Mississippi, Oregon, Pennsylvania, Texas, Utah, Virginia and Wyoming."

If the reward of acquittal is to be forced on a villain who can hide from his victim all evidence that he committed a rape, except her own testimony, it should emanate from the legislature, and not from the court.

In the present case, however, the corroboration is ample.

EMALINE C. PARSON, APPELLANT, V. JOSEPH F. MURPHY ET AL., APPELLEES.

FILED JULY 10, 1917. No. 20055.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: DEPENDENT. In the meaning of the employers' liability act (Rev. St. 1913, secs. 3642-3696), dependency is not based solely upon a present legal obligation to support.
2. ———: ———: ———. Evidence examined, discussed in the opinion, and *held* that plaintiff is a dependent within the meaning of the act.
3. ———: ———: ———. Under the employers' liability act, the question of dependency is not determined by the fact that a decedent had or had not actually contributed to the support of a parent before the date of the accident.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Henry J. Beal, for appellant.

Mahoney & Kennedy and *Guy C. Kiddoo, contra.*

DEAN, J.

On January 29, 1917, Emaline C. Parson, plaintiff and appellant, began this action in the district court for Douglas county against defendants, in pursuance of the provisions of the workmen's compensation act, alleging generally that on March 23, 1916, her son Nels Parson, now deceased, while in the employ of Edward Carr, one of the

defendants, was kicked by a vicious mule that he was driving, and that was owned by Mr. Carr, and that as a result of the injuries so received her son died two days thereafter. Plaintiff alleged that her son was her only support, and that she is the only surviving relative who sustained to Nels Parson the relation of dependent. She prays for judgment for the amount of one-half of her son's wages for 350 weeks, together with $100 expenses and $90 hospital and physician's expenses, and for costs.

For answer defendants admit the employment of plaintiff's son, but allege it was only casual, and that the dependents of Nels Parson, if any, are therefore not entitled to the benefits of the workmen's compensation law, deny that Nels Parson's death was caused by or contributed to by any personal injury by accident arising in the course of his employment by the defendants, and that his death was due to other causes separate from any injury sustained while in defendants' employ, and that the injuries were due to wilful negligence and to intoxication, and that plaintiff's son never contributed to her support so as to entitle her to claim benefits as a dependent under the workmen's compensation act.

The trial court found generally in favor of defendants, and rendered a judgment against plaintiff for costs. Mrs. Parson has brought the case here for review.

The employers' liability act, in section 3665, Rev. St. 1913, among other things, provides: "Dependents. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee. (a) A wife upon a husband with whom she is living at the time of his death; (b) husband upon a wife with whom he is living at the time of her death; (c) child or children under the age of sixteen years (or over said age, if physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of death of such parent, there being no surviving parent. * * * (e) In all other cases, questions of dependency, in whole or in part, shall be determined in accord-

ance with the fact, as the fact may be at the time of the injury. * * * (f) No person shall be considered a dependent, unless he or she be a member of the family of the deceased employee, or bears to him the relation of widow or widower, or lineal descendant, or ancestor, or brother, or sister. (g) Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee, and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto, or their legal guardians or trustees."

Defendants insist that the injury sustained by Nels Parson was due to his wilful negligence and to intoxication. The act expressly provides that the burden of proof to establish wilful negligence on the part of an injured employee is on the defendant. In the present case defendants introduced no testimony, and there is no proof of such negligence before us. Some testimony was brought out on cross-examination showing that plaintiff's son was intoxicated to some extent when he was injured, but it is nowhere shown that his intoxication in any way contributed to his injury, and without proof we will not assume that it did.

Mrs. Parson is a widow about 77 years of age, and unable to work on account of illness and extreme old age. For her sole support she has $300 or $400 deposited in a bank, which draws 4 per cent. interest. When this sum is expended she will be reduced to penury and will become a public charge. Her son was a single man when injured, about 40 years of age, without any other person dependent upon him. She testified that in November, 1915, about five months before the injury, she received a letter from him in which he promised to come and live with her and to support her, but that soon thereafter he became ill and could not do so.

Defendants argue in their brief: "The question of the right of the plaintiff to compensation must be determined by whether or not the deceased was actually contributing to her support. If he was not, she incurred no pecuniary

loss by reason of his death, and consequently is entitled to no compensation. * * * The plaintiff has not lost one iota of the support upon which she was dependent prior to Nels Parson's death." Elsewhere in their brief defendants concede that, "if in the case at bar Mrs. Parson had been living with her deceased son, and had been supported by him, there would be no question as to her right to compensation."

Defendants' argument on this point cannot be sustained. We believe the statute is susceptible of an interpretation that more nearly accords with the main purpose of its enactment. The act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly litigation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a public burden. To adopt defendants argument would require us to announce a rule that is not warranted by the act, nor by common experience. It is not shown that the widow's son made any contributions to her support. But in any event this feature is not important, in view of our holding that the question of contribution, as it is contended for by defendants, is not controlling. To illustrate: For its daily bread a family is ordinarily dependent upon the daily labor of the head of the household. The bread winner, a day laborer with little means is stricken. There remain surviving a widow, who by reason of age is unable to support herself, and a wage-earning son who is without dependents, and who has not recently lived with his parents, nor has he ever contributed to the support of either. In such case would it be seriously contended that the mother was not a dependent of her son in the ordinary and everyday meaning of the word, even though when her husband died she may have been provided with a small store of food and raiment to supply her every present need, sufficient for a few weeks or months at most?

Will it be argued that a supply of food that would sustain life for a day or a week would take plaintiff out of the dependent class? We cannot hold that the legislature contemplated a construction at once so literal, so restricted, and so unreasonable.

That plaintiff's son was capable of earning the wages usual to his employment affirmatively appears, and is not challenged in the record. But for the accident he would now, in human probability, be a wage-earner, and thus be in position to support plaintiff in pursuance of his promise. It is always presumed, until overcome by proof, that a man will do his duty. It cannot be known, and it will not be presumed, that Nels Parson, if living, would be unmindful of his filial duty, with or without promise, to support his aged and dependent parent. The question of legal liability to support does not of itself determine the question at issue, nor in the present case will the fact that Nels Parson was only occasionally employed by defendants defeat plaintiff's action, as argued by them.

The statute nowhere undertakes to define dependency. Its language is that "dependency shall be determined as of the date of the accident to the employee." If, then, plaintiff was not a dependent of her son Nels, upon whom was she dependent? Surely, in view of the facts, she could look to him for support. So far as the record and plaintiff's argument shows, her son fulfilled every statutory requirement, unless such requirment makes it imperative that at "the date of the accident" he should have been living with and at the time actually supporting his mother. This we think is too technical, and we cannot adopt defendants' reasoning on this point. Dependency under the statute may perhaps be held to mean for such food, clothing and shelter as may be necessary for the living of a person in his class and station, as distinguished from provision for the bare wants of existence. It is substantially the same principle that is involved in determining in a proper case what would be necessaries for a minor. In view of the record and of the law, we decline to hold that because a por-

tion of plaintiff's meager store remains unused, and because she neither lived with nor was supported by her son, she was not therefore his dependent at the time of the injury.

Defendants cite *Pinel v. Rapid Railway System,* 184 Mich. 169, but it does not seem to be applicable to the case at bar, for the reason, among others, that the claimant had a life lease on a farm of 87 acres in Macomb county and another son resided with her.

Crockett v. International R. Co., 162 N. Y. Supp. 357, is a case where the employee married within six days after sustaining the injury from which he subsequently died. Suit was commenced by his widow, and it was held that she was his dependent at the date of the accident, notwithstanding the statute provided that "all questions of dependency shall be determined as of the time of the accident." In that case the rule was relaxed, and the decision based on the ground that plaintiff was the "surviving wife," and as such was entitled to compensation under the statute because at the time of her husband's death she came within a class that the statute conclusively fixed as dependent.

Sweet v. Sherwood Ice Co., 100 Atl. (R. I.) 316, reviews some of the cases on the question of dependency, and says: "They do not baldly hold that the legal obligation determines the question of dependency, but that such legal obligation must be coupled with a reasonable probability that such obligation will be fulfilled." See *Purdy v. Watts,* 99 Atl. (Conn.) 496; 1 Bradbury, Workmen's Compensation (2d ed.) 575 *et seq*; 6 B. W. C. C. 348; 1 B. W. C. C. 85.

The word "dependent" should not be given its narrowest nor its most literal meaning, when considered in connection with the act in question, its aims and objects. 6 Bradbury, Workmen's Compensation, 571, gives this definition: "The expression 'dependent' means dependent for the ordinary necessaries of life for a person of that class and position in life, taking into account the financial and social position of the recipient."

In *Powers v. Hotel Bond Co.*, 89 Conn. 143, in which is involved a like act, it is aptly said: "The act, by eliminating the proof of negligence, by minimizing the delay in the award and by making it reasonably certain, seeks to avoid the great waste of the tort action, and to promote better feeling between workmen and employer, and accepts, as an inevitable condition of industry, the happening of accident, and charges its cost to the industry."

Kennerson v. Thames Towboat Co., 89 Conn. 367, L. R. A. 1916A, 436: "George Marsdale left surviving him two brothers, a sister, and a mother, claimant herein. He had, during the illness of his father, sent his mother from July until his father's death, November 10, 1913, $10 a week of his weekly wages of $15. After her husband's death the mother went to live with her son Charles temporarily, and on December 9, 1913, the decedent engaged in said employment with the respondent for $30 a month and his board, worth 50 cents a day. Out of his earnings the decedent gave his mother from $20 to $25 a month, which sums were to pay the funeral expenses of her husband. These were just paid prior to George's death. The mother and decedent had arranged that, as soon as the funeral expenses were paid, her residence with her son Charles should cease, and they should then live together and the decedent should support his mother. Except as stated, none of the children contributed to the support of their mother." In that case it was held: "That Mrs. Marsdale, the mother of George Marsdale, was a total dependent of her son George." It will be noted that George Marsdale did not contribute anything toward the support of his mother after his father's death, but that the money that he sent to her after that event was all devoted to the payment of the funeral expenses attendant upon the death of his parent, an item that was perhaps not chargeable to his mother in any event, though the record is silent on this point.

1 B. W. C. C. 332, cites *Medler v. Medler*, which holds: "A wife who had been turned out of her home by her husband and had not been living with or supported by him for

11 years before his death, but who had made endeavors to obtain support, was held to be in part dependent upon her husband's earnings at the time of his death within the meaning of schedule I (1) (*a*) (ii) of the Act of 1906."

Speaking generally, it may be borne in mind that a dependent who avails himself of the act is deprived of having a jury pass upon any of the questions that pertain to the injury or the cause of death of the person upon whom he may be dependent for support, and for this reason, among others, the statute, which is remedial in its nature, should be liberally construed. If our statute means that, unless the son is actually contributing to the support of his mother at the time of the accident, she is not a dependent within its meaning, and if this doctrine is established as a general rule, it would lead to strange conclusions. If such construction is proper, it is a very unfortunate statute, because, prior to its enactment, the mother could plainly recover damages for the death of a son who sustained to her the same relation as a dependent that Nels Parson sustained to plaintiff. That we have decided many times, and to now hold otherwise is to hold that the statute has done away with the plainest dictate of humanity. Under the law the mother could compel her son to contribute to her support, and yet because he does not do so, and because she can live a month or so without his doing so, we construe the statute to mean that he need not support her, and that it was no advantage to her to have him in a position to do so. Under such circumstances, the facts existed at the time of the accident which would make her dependent upon her son, although he failed to perform his duty and failed to contribute anything toward her support. One may be at the present time dependent upon his growing crop of wheat for his daily bread, and yet a drouth may destroy the crop and deprive him entirely of that support. Can it be said that at the time that the wheat was in the process of maturing he was not dependent upon that crop? And so one may give any number of illustrations, all showing that the fact exists at the present time that we

depend upon something for our support, although that particular thing may not be actually supporting us at the present time.

Boyd v. Pratt, 72 Wash. 306, construes a statute containing this language: "If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive $20 a month for each month after his death until the time at which he would have arrived at the age of twenty-one years." Laws Wash. 1911, ch. 74, sec. 5, subd. 3. It was there held that a parent, who is also a dependent, is entitled to the monthly payment during the continuance of dependency, and not merely to the time of majority.

Pittsburgh, C., C. & St. L. R. Co. v. Collard's Adm'r, 170 Ky. 239, is a recent case which construes the federal employers' liability act of April 22, 1908 (35 U. S. St. at Large, ch. 149, p. 65). It is there held: "It is not necessary to prove that a decedent has made actual contributions to the support of his parents in order to establish a reasonable expectancy of pecuniary benefit from the continuance of his life." The same case holds that declarations made by decedent that he intended to support his father were sufficient to sustain a verdict in behalf of the father. To the same effect is the following: *Tobin v. Bruce,* 162 N. W. (S. Dak.) 933. See, also, *Garrett v. Louisville & N. R. Co.,* 197 Fed. 715; *Michigan C. R. Co. v. Vreeland,* 227 U. S. 59.

The employers' liability act is new to our state. The questions involved in its construction are not without difficulty. Adjudicated cases are not numerous, and there is some conflict among them, due in part to slight differences in the wording of the statutes of the different states. On the points in dispute we have adopted the rule that appears to us to harmonize with the true intent of the legislature.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

JOHN J. BOUCHER, APPELLEE, V. CASUALTY COMPANY OF AMERICA, APPELLANT.

JOHN J. BOUCHER, APPELLANT, V. CASUALTY COMPANY OF AMERICA, APPELLEE.

FILED JULY 14, 1917. Nos. 19529, 19660.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *No. 19529 reversed, and No. 19660 affirmed.*

McLaughlin & Neely, for plaintiff.

James C. Kinsler, contra.

PER CURIAM:

In the trial of these cases the judgment in No. 19176, *Shick v. Johnson,* was relied upon as the foundation of both actions. That judgment having been reversed by this court (*Shick v. Johnson, ante,* p. 328), the judgment in *Boucher v. Casualty Company of America,* No. 19529, is reversed and the cause remanded, and the judgment in *Boucher v. Casualty Company of America,* No. 19660, is affirmed.

JUDGMENTS ACCORDINGLY.

STATE OF NEBRASKA, APPELLANT, V. LOUIS KELLER, APPELLEE.

FILED JULY 14, 1917. No. 19469.

Courts: JURISDICTION: HEIRSHIP. The county court has jurisdiction, in the final settlement of the estate of deceased persons, to determine the persons who are the heirs of the deceased, and its judgment in this respect, if the jurisdictional prerequisites have been complied with, is final and conclusive. *Fischer v. Sklenar*, p. 553, *post*.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Willis E. Reed, Attorney General, and *W. T. Thompson,* for appellant.

J. E. Willits and *J. W. James, contra.*

LETTON, J.

This was an action brought by the state of Nebraska to quiet the title to 80 acres of land in Adams county, the title to which the petition alleges became vested in the state of Nebraska by escheat, upon the death of Henry Keller, the owner of the same, without widow or heirs. The petition also alleged that a claim of title made to the same by the defendant Louis Keller was unfounded and invalid, and cast a cloud upon the plaintiff's title, which it prayed to have removed. Louis Keller answered that Henry Keller died seised of the real estate and without widow and heirs, except himself, who was the brother and sole and only heir at law. He further pleaded an adjudication on appeal from the county court of Adams county in administration proceedings, in which he had been adjudged to be the only brother and sole heir at law of Henry Keller, deceased. The district court found generally for the defendant and dismissed plaintiff's petition. Plaintiff appeals.

The state introduced evidence to show that, so far as any one in the locality where Keller had lived for about 15

years knew, he had no living relative. After the state rested, defendant proved that Keller had spoken to some of his neighbors of a brother in New York City, and an aunt. The only other material evidence for defendant is a transcript of certain proceedings in the county court, and on appeal to the district court, on a petition of Louis Keller in the administration proceedings to be decreed the sole heir of Henry Keller.

The question is whether this decree is *res judicata* that Louis Keller is the sole and only heir of Henry Keller, deceased. The state insists that it was error for the trial court to admit the record, for the reason that the county court had no jurisdiction to determine the title to real estate. The defendant insists that the decree establishes the status of the heirs to the estate of the deceased, and unless avoided in some mode prescribed by law it binds and concludes the whole world. The question was exhaustively argued in the case of *Fischer v. Sklenar*, p. 553, *post*. After protracted deliberation and consideration, it was held in that case that the county court in the settlement of the estates of deceased persons has jurisdiction to find and determine who are the heirs of the deceased. The contention of the state must therefore fail in this respect.

It must be said also that in our opinion the state failed to produce sufficient evidence to make a *prima facie* case, since there was no proof of inquiries having been made as to the relatives of Keller at the place where he had formerly resided.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

JOHN M. FISCHER, APPELLEE, V. VYT SKLENAR ET AL., APPELLANTS; WALLACE P. DIXON ET AL., APPELLEES.

FILED JULY 14, 1917. No. 19999.

1. **Descent and Distribution:** ADJUDICATION OF HEIRSHIP. A finding in a decree for final distribution of the estate of a deceased per-

son that a certain person is the sole heir of the deceased, and an order assigning the estate of the deceased to the person so found to be the heir, complies with the provisions of sections 1494, 1495, Rev. St. 1913, and is a sufficient adjudication of heirship.

2. Judgment: COLLATERAL ATTACK: PROBATE COURT. Upon its probate side a county court is a court of general jurisdiction, and its judgment upon matters of probate and of settlement and distribution of the estates of deceased persons made upon due and proper notice is final and cannot be collaterally attacked.

3. Courts: JURISDICTION: HEIRSHIP: TITLE TO REALTY. The probate court in the settlement of an estate has jurisdiction to find and determine who are the heirs of the decedent. In so doing the court does not determine the title to real estate. The statute of descent passes the title upon the fact so found. The final determination of such fact by the probate court is binding upon all parties interested in the estate, unless it is set aside upon appeal.

4. Aliens: LANDS: TIME FOR DISPOSITION: QUESTION FOR COURT. Under art. II of the treaty of 1848 with Austria-Hungary (9 U. S. St. at Large, p. 945) alien heirs are allowed a term of two years in which to sell lands which they acquire, "which term may be reasonably prolonged, according to circumstances." The question as to the reasonableness of the prolongation is a matter for the courts to determine. *Pierson v. Lawler*, 100 Neb. 783.

5. Treaties: CONSTRUCTION. Treaties should be construed liberally in order that justice may be done to citizens or subjects of the contracting parties.

6. Aliens: DISPOSITION OF LAND: EXTENSION OF TIME. Where the circumstances make it reasonable that such aliens should have further time than the two years prescribed in which to sell their interest in the real estate, such further time as may be reasonable under all the circumstances of the case should be allowed.

7. ———: ———: ———. Under the circumstances set forth in the opinion, a period of between eight and nine months after the expiration of two years from the death of the person from whom the estate passed is held to be a reasonable prolongation.

APPEAL from the district court for Burt county: GEORGE A. DAY, JUDGE. *Affirmed.*

Frank L. McCoy and *E. H. Westerfield,* for appellants.

E. C. Page, B. E. Hendricks, B. C. Enyart and *F. S. Howell, contra.*

Fawcett & Mockett and *H. M. Uttley, amici curiæ.*

LETTON, J.

Action to quiet the title to certain lands in Burt county. Both parties claim title by inheritance from Augustine Sklenar, deceased, who died intestate in that county on the 27th day of December, 1909.

The plaintiff claims by mesne conveyances from Marie Anna Hamernik, a resident and citizen of Bohemia. The facts upon which plaintiff bases his claim of title are as follows: In the settlement of the estate of Augustine Sklenar, deceased, in the county court of Burt county, upon the application of the administrator for final settlement of the estate, a petition was filed in behalf of Mrs. Hamernik alleging that deceased died unmarried and without father or mother, that she was the illegitimate child of the deceased, that he had acknowledged himself in writing to be her father, and that she was his only child and sole heir, and praying that she be so adjudged and declared. She was so found and adjudged by the county court on August 27, 1912, and the real estate was duly assigned to her by said court.

The defendants are brothers and sisters of Augustine Sklenar, deceased, and parties claiming title under them. They admit that the deceased died intestate and unmarried, but deny that he had any children or issue either illegitimate or legitimate, and deny that he ever acknowledged himself to be the father of Mrs. Hamernik. They admit the administration proceedings, upon due notice, and the entry of the decree finding Mrs. Hamernik to be the sole heir and assigning the real estate to her, but deny that the same was made with jurisdiction or power in the court to enter such decree. They also allege that the deeds and conveyances from Mrs. Hamernik to the grantees therein under whom the plaintiff claims title are null and void as to these defendants and their grantees because they are in violation of the common law, of the Nebraska nonresident alien land statute, sections 6273, 6276, Rev. St. 1913, of the treaty of 1848 between the United States and Austria, of the Fourteenth Amendment to the Constitution of the

United States and the Constitution of the state of Nebraska; as an attempt to take the property of the defendants without due process of law; and as contrary to the meaning of the treaty of 1848. The remaining pleadings amount in substance to general denials of the material facts pleaded in the answer. A motion for judgment upon the pleadings was made by plaintiff and the other parties interested in like relief. In substance the court found that the county court of Burt county had full jurisdiction to make the findings, orders, and decrees of August 27, 1912, and that the same were and are binding and conclusive; that Marie Anna Hamernik is the sole heir of Augustine Sklenar, deceased, and it quieted the title in the plaintiff. Defendants appeal.

Three points are presented for review: (1) Was the decree of the county court a final and competent adjudication of heirship in Mrs. Hamernik? (2) Was this made with jurisdiction of the subject-matter and of the parties, and was it conclusive and *res judicata* as against the defendants and all persons claiming through or under them? (3) Granting that said finding was a conclusive adjudication that Marie Anna Hamernik was the daughter and sole heir of the deceased, did the failure on her part to sell and dispose of the real estate within two years from the death of the intestate under the terms of the treaty deprive her of any interest which she may have had in the land and operate to carry the title to the brothers and sisters of the intestate?

1. The appellants insist that no formal and valid decree of heirship and distribution of the land to Mrs. Hamernik was ever made; that it contains no language constituting a judgment, and hence is no adjudication. After making the customary recitals, the decree recites that the administrator *de bonis non* of the estate and the attorney in fact for Mrs. Hamernik appeared in person, and that each was sworn as a witness and testified in the matter. After finding that due notice of the hearing had been given, and the finding of facts as to the death of Sklenar,

his ownership and possession of the real estate, that due notice had been given of the time limited for the filing of claims against the estate, that an order had been made barring claims, that all claims allowed have been paid, and that more than two years have elapsed since administration was begun, the decree proceeds: "The court further finds that Augustine Sklenar, deceased, left no widow surviving him; that he left surviving him as his sole and only heir at law Marie Anna Hamernik, of Trebon, Bohemia, Europe, and that said Marie Anna Hamernik is now of full legal age." A number of other findings were made. The court then allows and confirms the reports of the administrator and orders the balance in his hands paid to the attorney of Mrs. Hamernik. The decree then proceeds: "It is further adjudged and decreed by the court that the real estate belonging to said estate, as hereinabove described and fully set out, be, and the same hereby is, assigned to Marie Anna Hamernik, of Trebon, Bohemia, Europe." The land had been fully described in a foregoing part of the decree.

The statute, sections 1494, 1495, Rev. St. 1913, provides: "1494. After the payment of the debts, * * * the county court shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same." "1495. In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled." The decree found that Mrs. Hamernik was "the sole and only heir at law" of the deceased, and it assigned the real estate, which was described in the decree, to her by name. It may be conceded that it would have been better for the court to have made a more specific and formal entry adjudging that Marie Anna Hamernik was the child of Augustine Sklenar, was duly acknowledged to be such by him, and is his sole heir. Proceedings to administer estates of deceased persons in probate courts are statutory. When the record shows that the statutory findings and orders have been made, it is sufficient, even though not in the ordinary form. A

finding that a person is the sole heir of another, and a judgment and order assigning the estate of the deceased to the person so found, naming the person and the proportion to which he is entitled, and assigning the estate to the person who is by law entitled to the same, complies with the statute. The authorties cited by the appellant applying to ordinary courts, justices of the peace, and courts of record, are not applicable. In *Boales v. Ferguson,* 55 Neb. 565, cited by appellant, the heirs were not named, nor the amounts due them, respectively, determined, and the administrator having assumed the responsibility of distributing the estate before this was done was held to answer to those who had suffered by his error.

2. It is conceded by defendants that as a general rule probate courts in the exercise of their original jurisdiction in the settlement of estates are vested with power and jurisdiction, at the time a final decree of distribution is made, to ascertain and determine the persons who constitute the heirs at law of the deceased, and that if such adjudication is made upon proper notice as required by the statutes of the several states, either personal or constructive, it is final and conclusive against all parties interested, whether present or absent, whether having received actual notice, or not, and against the whole world. But defendants maintain that this general rule is not applicable in the state of Nebraska. It is their contention that, in view of the history of the constitutional and statutory provisions concerning the jurisdiction of the probate and county courts of Nebraska in territorial times, and since the territory became a state, the makers of the Constitutions of 1866 and 1875 intended to and did take away all jurisdiction of the probate and county court with reference to real estate, and that no act, judgment or decree of such courts can in any manner affect the title to lands. They concede that a judgment of heirship is valid and effectual as to the personal property of the deceased and is sufficient to authorize the administrator or executor to distribute the property in accordance with the decree.

Their argument, much abridged, is about as follows: That in the organizing act of 1854 (1 Complete Session Laws, p. 4) section 9, creating the territory of Nebraska, it was provided: "That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as limited by law: Provided, that justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute." That in the Constitution of 1866, art. IV, sec. 4, it was provided: "The jurisdiction of the several courts herein provided for both appellate and original shall be as fixed by law: Provided, that probate courts, justices of the peace, or any inferior court, that may be established by the legislature shall not have jurisdiction in any matter wherein the title or boundaries of land may be in dispute. Nor shall either of the courts mentioned in this proviso have the power to order or decree the sale or partition of real estate." The Constitution of 1875, article VI, sec. 16, provided: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts; in all matters relating to apprentices; and such other jurisdiction as may be given by general law. But they shall not have jurisdiction * * * in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate."

Under the statutes of 1855, 1856, and 1866, the probate courts were given power to decree sales of real estate to pay debts, and to make partitions of real estate. In 1867, however (General Laws 1867, p. 123), the decedent law was amended by substituting the word "district" for "probate" in a number of sections, so that the power to sell or partition real estate was thereby taken from the probate

court and vested in the district court. In *Stewart v. Daggy,* 13 Neb. 290, it is said: "The gross abuse of the power in some of the counties led to the insertion of a provision in the Constitution of 1867 depriving the probate courts of the authority to grant license, and conferred the same on the district courts. * * * The sole object of the change, so far as we can determine, was to place the matter in the hands of judges who would be free from local influence, and also, from their greater knowledge of the law, would be presumed to exercise greater care and circumspection in authorizing a sale."

The statutory provisions involved under which the county court acted are sections 1494, 1495, Rev. St. 1913, hereinbefore in part set forth.

Defendants insist that on account of the prohibitions in the Constitution the county court obtained jurisdiction only of the personalty of the estate by administration proceedings; that a finding as to heirship made in such proceedings can only have the force to protect the administrator in the distribution of the personal estate, and therefore the decree of the court is of no force, validity or effect as evidence of heirship in a controversy over the title to land. It is said that to hold otherwise would require an adjudication of heirship by a county court as a prerequisite to the passing of the title to real estate of deceased persons, and would imply that no title passing through an intestate is good which does not show upon the records or upon the abstract such a decree of heirship. This conclusion does not follow. We have held that heirship may be proved in many ways. *Jetter v. Lyon,* 70 Neb. 429. The heir may maintain ejectment while probate proceedings are pending, unless the administrator takes possession under the statute. *Lewon v. Heath,* 53 Neb. 707; 2 Woerner, American Law of Administration (2d ed.) sec. 337. We have held that the proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem.* Every one interested is a party in the probate court, whether he is named or not, and this is particularly true

as to the question of distribution of the estate. As to probate matters the county court is a court of general jurisdiction. Its judgment upon matters within its jurisdiction cannot be collaterally attacked. *Lydick v. Chaney,* 64 Neb. 288; *Miller v. Estate of Miller,* 69 Neb. 441; *In re Estate of Creighton,* 91 Neb. 654. The grounds upon which courts generally have arrived at such conclusions are that a proceeding to settle and distribute the estate of a deceased person is of the nature of a proceeding *in rem;* that, upon the presentation of a petition for letters of administration and the appointment of an administrator, the court takes control of the *res,* and thereafter, when proper notice has been given of the time and place of the hearing, the *res* itself is within the jurisdiction of the court, and, the interested parties being either actually or constructively present in accordance with the notice, the court has jurisdiction of both the parties and the subject-matter, and its judgment is final and conclusive unless appealed from.

The question is whether proceedings in the county court by which that court ascertains who are the heirs of the decedent to whom the administrator must yield possession of the estate are "actions in which title to real estate is sought to be recovered or may be drawn in question," of which class of actions that court has no jurisdiction under the Constitution.

Under the statute, on the death of an owner of land, the same descends *eo instanti* to his heirs, whomsoever they may be, unless, however, he has disposed of the same by will. *Prima facie* no will exists, and, until the existence of the writing has been shown and the instrument probated and established as having been executed in accordance with the statute, there is no cloud upon the title of the heirs to the real estate. *Brown v. Webster,* 87 Neb. 788. If, however, a will is produced, which by its terms grants and devises lands of the testator to others than his natural heirs, a decree of the court establishing the fact that the instrument is the last will of the testator

affects the title to real estate as much as would a finding and decree of heirship made by the same court in the settlement of the estate of an intestate. The decree establishing the will would in no sense settle the identity of the persons named therein, nor would it settle other questions which might arise affecting the title to the real estate devised, such, for instance, as the validity of prior contracts to convey the same, which courts of equity frequently enforce; or which of the devisees take under conflicting provisons of the will. The sole fact that it establishes is that the testator executed the document in conformity with the statute. The title passes, not by the decree, but by the operation of the statute of wills. In a case where the county court in proceedings under proper notice ascertains who are the children or next of kin of the deceased, that fact, so adjudged, which it has jurisdiction to establish, does not affect the title to real estate any more than does an adjudication that an instrument is the last will of the deceased.

The object of a decree of distribution is to determine to whom the estate of the deceased should be delivered. Neither adverse claims, nor title to the property can be litigated in the proceeding. The title itself may not be drawn in question. No title passes by the decree to the persons named as heirs. It passes by the statute of descent, and not by the decree, which merely determines which persons are within the class to which the statute of descent applies. 11 R. C. L. 183. The county court has no power to determine the title of any one of them to any particular tract of land, since the power to partition real estate has been taken away from it by the Constitution and is now vested in the district court. "Since the functions of probate courts are limited, in respect of executors and administrators, to the control of the devolution of property upon the death of its owner, it is not their province to adjudicate upon collateral questions. The right or title of the decedent to property claimed by the executor or administrator against third persons, or by third per-

sons against him, as well as claims of third persons against creditors, heirs, legatees, devisees, or distributees, must, if an adjudication become necessary, be tried in courts of general jurisdiction, unless such jurisdiction be expressly conferred on probate courts." 1 Woerner, American Law of Administration (2d ed.) sec. 151.

The decree of the county court which ascertains the persons who are the heirs of a deceased person finds a fact and adjudges a status. It is a common thing that courts which have no jurisdiction to act upon certain matters may have jurisdiction to determine certain basic facts upon which the decision of the other matters may eventually depend. For instance, the courts of this state have no right to grant or refuse a license to sell intoxicating liquors in a given locality. The matter rests solely within the jurisdiction of the respective local administrative bodies, but the courts have the right to determine whether the jurisdictional facts exist which authorize the administrative officers to act. While the ultimate result may be to stop the issuance of a license, and the court has no power to grant or refuse it, yet the determination of the question is within its jurisdiction.

Field v. Clark, 143 U. S. 649, 12 Sup. Ct. Rep. 495, was a case in which the reciprocity act, which authorized the president to suspend the provisions of the act relating to the free introduction of sugar and other articles of commerce as to any countries "which he 'may deem to be reciprocally unequal and unjust,'" was attacked as unconstitutional because it gave the president both legislative and treaty-making powers. The court said (quoting from *Locke's Appeal,* 72 Pa. St. 491): "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." It was also considered, reviewing the precedents, that congress had many times made the suspension of certain provisions and the going into effect of other provisions of acts of congress depend upon the as-

certainment by the president of certain facts to be made known by his proclamation. It was said: "As the suspension was absolutely required when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws."

The proviso in section 16, art. VI, Const., is that county courts shall not have jurisdiction "in actions" in which the title to real estate is sought to be recovered or may be drawn in question. The word "actions" is not usually considered to include such proceedings as the settlement of estates, the probate of wills, or the distribution of property, though proceedings ancillary thereto may partake of the nature of actions, and issues may be raised as to title. In any such proceeding before the county court, if "title to real estate is sought to be recovered, or may be drawn in question," that court cannot make a final determination of such title. The history of legislation in this state seems to demonstrate that the intention was not to curb and limit the jurisdiction of county courts in purely probate matters, but in the civil and criminal jurisdiction which might be conferred upon them by the legislature. The proper construction of section 16, art. VI of the 1875 Constitution, is (though perhaps not in accordance with the punctuation) that the limitation therein contained only applies to and limits the last clause of the preceding sentence. After giving county courts original and unlimited jurisdiction in probate matters and in the settlement of estates of deceased persons, it is provided that such courts shall have such other jurisdiction as may be given by general law. "But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment, or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed

shall exceed one thousand dollars." None of these restrictions seem applicable to such courts in the exercise of purely probate jurisdiction. Probate, orphan, or surrogate courts do not have criminal jurisdiction, nor power to try title to land, nor to foreclose mortgages, nor ordinary civil jurisdiction. *Brogan v. Brogan,* 63 Ark. 405, 58 Am. St. Rep. 124; *Buckley v. Superior Court,* 102 Cal. 6, 41 Am. St. Rep. 135. Then, why should such a limitation be announced, if it did not apply to the extra or additional jurisdiction which might be conferred by act of the legislature? A consideration of the whole history of courts of probate in this country supports this construction. 1 Woerner, American Law of Administration (2d ed.) secs. 11, 141; Smith, Probate Law (5th ed.) ch. 1; Gary, Probate Law (2d ed.) ch. 2. Again, if a decree of distribution and ascertainment of heirship is an "action," then a claim against the estate of a decedent for a sum of money may with equal propriety be termed a "civil action," and the result of this construction would inevitably be that county courts in the settlement of the estate of deceased persons would have no jurisdiction where the claims exceeded $1,000. In this view of the case, we must conclude that the word "actions" in the one clause and "civil actions" in the other do neither refer to matters concerned with the settlement of estates.

Heretofore it has been assumed that the county court had power to determine the persons who were the heirs of a deceased intestate, and also to decide whether a person claiming to be the widow of an intestate and entitled to share in the distribution did in fact sustain such relationship. *Security Investment Co. v. Lottridge,* 2 Neb. (Unof.) 489; *Sorensen v. Sorensen,* 56 Neb. 729, 68 Neb. 483, 490. In the former case we find the following, after citing the statute as to the decree of distribution set forth hereinbefore: "The effect of these provisions seems to be to give the executor or administrator the possession pending settlement of the estate, and to require an order for delivery of the real estate in bulk to its owners when this is

done, and leave them then to apply to the district court for partition, if they can not divide it themselves." In the latter case (68 Neb. 490) we find: "The principal relief sought in a proceeding *in rem* is usually an adjudication upon the status of some person or thing, and the judgment, *ipso facto,* renders the status of such person or thing what it declares it to be. *Woodruff v. Taylor,* 20 Vt. 65. From the very nature and purpose of such judgment, it is essential that it be conclusive and binding on all persons. * * * We think the true rule is that a judgment *in rem* is binding and conclusive upon all persons as to every matter necessarily involved in the adjudication upon the status of the person or thing which is the subject-matter of the proceeding, but as to matters involved in collateral litigation therein, between particular parties, and not necessarily involved in a judgment of that character, it is binding only upon those who actually litigated such matters and their privies."

The statute, section 1366, Rev. St. 1913, gives the administrator the right to the possession of the real estate of the deceased, other than the homestead, and to its rents and profits "until the estate shall have been settled, or until delivered over, by order of the county court, to the heirs or devisees." And he may maintain ejectment to recover possession. *Dundas v. Carson,* 27 Neb. 634; *Tillson v. Holloway,* 90 Neb. 481. In order to relieve the personal representative of liability for rent and profits, the real estate must be delivered by him to the parties entitled thereto, and the ascertainment of the proper persons is strictly within the jurisdiction of the county court. *Boales v. Ferguson,* 55 Neb. 565; *Fauber v. Kein,* 88 Neb. 379.

As to what has been said by the appellants with reference to the contemporaneous construction of this statute, if construction by the legislature itself has any weight, that body has assumed that the power to determine who are the heirs of a deceased person resides in the county court by enactment of sections 1356-1360, Rev. St. 1913, passed in 1905, whereby proceedings for the ascertain-

ment of heirship without administration have been provided for. Furthermore, it has been well-nigh the universal custom for very many years, of which fact we may take judicial knowledge, that examiners of title have required exemplifications of the records of the county court showing the administration of the estate of a deceased landholder, and a final decree settling the estate and ascertaining and adjudging who are the heirs, before title derived by descent would be approved. In the absence of such a decree, in very many instances competent and satisfactory proof of heirship would almost be impossible to obtain. In answer to the argument that valuable rights may be lost by such decrees based upon constructive service of which other heirs may have no notice, the plaintiff urges that, under sections 8207-8215, Rev. St. 1913, ample provision is made for the vacation of judgments after the term; that by section 8215, Rev. St. 1913, these provisions are made applicable to county courts as well as to the district courts. They also provide for the contingency that one or more persons affected may be minors, and a period is allowed to minors after arrival at their majority in which their rights may be asserted. Whether these provisions are applicable to such decrees is not decided. The evil that may result, as pointed out by the defendants, from deciding that such decrees are conclusive as to matters of heirship may equally occur with respect to holding any judgment conclusive rendered upon proper constructive service if it affect the title to real estate; but there is no question that such judgments are final. In *Youngson v. Bond,* 69 Neb. 356, and other cases cited by defendants, which are all cases involving wills and their construction, it is held that such adjudications by county courts are made only for the purpose of advising and directing the executor in the discharge of his duties, and cannot bind the devisees as to their rights in the estate. The conclusion of the court in the cases was correct, but some of the language used in these opinions is susceptible of too broad a meaning. Properly considered, these cases are not in con-

flict with the views expressed herein. *Youngson v. Bond, supra,* holds that a suit brought by an administrator with the will annexed on the theory that a construction of the will was necessary in order to enable him to settle the estate is maintainable in the county court, and is within the exclusive original jurisdiction of that court; but that suit by trustees under the will, after settlement of an estate, to obtain a construction of the provisions of the will relating to their trust can only be brought in the district court. It is said by Commissioner Pound: "It is urged that section 16, art. VI of the Constitution, precludes a county court from construing a devise of lands. We do not think the provision in that section that the county court shall have no jurisdiction 'in actions in which title to real estate is sought to be recovered, or may be drawn in question,' affects the conclusion already reached in any way. The evident meaning is that the county court shall have no jurisdiction of actions to recover real property or wherein the present title to real property is directly or substantially involved. But the provision does not mean that the county court is to be without jurisdiction where a question of title arises incidentally or collaterally or where the present title is not involved. Many actions which are not in form brought to recover the title to real property, nevertheless, have the effect of settling and adjudicating the present title."

It may be true that the county courts of this state have not fully realized heretofore the exceeding importance and gravity of the proceedings in such courts ascertaining the persons who are the heirs or next of kin of a decedent whose estate is being administered. No such finding should be made without competent sworn testimony. The record should show the names of the witnesses examined and the fact of such examination, and, if the court is not fully satisfied with the proof, it should investigate on its own motion. It has been said that the title to all the property of the state passes through the probate court periodically in a comparatively short interval of time. This is

largely true, and hence the necessity for care and deliberation in the proceedings and for the making of a proper record.

The following cases, mainly from states whose probate laws are based on that of Massachusetts, in which no such limiting clause is found in the Constitution, but in some of which county or probate courts have no other than probate jurisdiction, are in line with the views herein expressed. Space forbids quotation or exegesis of the holdings therein. *Christianson v. King County,* 239 U. S. 356; *Jones v. Roberts,* 84 Wis. 465; *State v. Probate Court of Ramsey County,* 25 Minn. 22; *Greenwood v. Murray,* 26 Minn. 259; *McNamara v. Casserly,* 61 Minn. 335; *Ladd v. Weiskopf,* 62 Minn. 29; *Case of Broderick's Will,* 88 U. S. 503; *Fitzpatrick v. Simonson Bros. Mfg. Co.,* 86 Minn. 140; *Morse v. Morse,* 42 Ind. 365. An interesting case is *Kcahi v. Bishop,* 3 Hawaii, 546.

We conclude that the decree of the county court finding that Mrs. Hamernik is the sole heir of Augustine Sklenar, deceased, is a valid and binding adjudication of that fact, and cannot be assailed in this proceeding.

3. Appellants also claim that, since Mrs. Hamernik has always been a nonresident alien, she could not in any event inherit the fee to the land; that she could at most take only a limited right in or power of sale in the same; that, since the intestate died on December 27, 1909, under the treaty of 1848 with Austria-Hungary she had no interest or power over the land after December 28, 1911, two years from the time of the death, and that the county court, for the same reason, had no power thereafter to assign, distribute, or confirm in her the title to the land. The intestate died on December 27, 1909. The final decree was rendered August 27, 1912. Mrs. Hamernik, by an attorney in fact, sold and conveyed the land on September 9, 1912. The property was farm land and had always been so used by the intestate. No extension or prolongation of Mrs. Hamernik's right to sell had ever been made by any court or tribunal. Articles I and II of the treaty (9 U. S. St. at Large, p. 945) are as follows:

"Article I. The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country, where the said property lies, shall be liable to pay in like cases.

"Article II. Where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same; which term may be reasonably prolonged, according to circumstances; and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn."

Section 6273, Rev. St. 1913, is as follows: "Nonresident aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time herein limited, such lands, so acquired, have not been sold to a *bona fide* purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Nebraska; and it shall be the duty

of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this article."

Section 6276, Rev. St. 1913, allows nonresident aliens who have acquired liens upon real estate in this state to take a valid title to the real estate, provided that such land shall be sold within ten years. It is also provided that the provisions of the article shall not apply to real estate lying within the corporate limits of cities and towns. It is held in *Pierson v. Lawler,* 100 Neb. 783, that, under a treaty providing that the term in which to sell real estate inherited by a nonresident alien shall "be reasonably prolonged if circumstances render it necessary," it is a question for the judiciary whether the circumstances were such as to prolong the prescribed period. The language of the treaty under consideration is that the term of two years "may be reasonably prolonged according to the circumstances." Whether the circumstances in this case justify the prolongation can only be determined by the courts. It is clear that the term of two years provided in the treaty merely prevents the state from limiting the term below that period. If the state chooses to extend the term by statute, there is nothing in the treaty which in any wise controls or interferes with its discretion. Its power is supreme unless in such matters controlled and governed by the treaty, which by the federal Constitution is a law of the United States. Considering the liberal policy on the part of this state with reference to allowing a reasonable time for disposing of land, and, if sold, reserving to the alien heirs the value of the land, these treaties and statutory provisions should not be construed with undue harshness. Rev. St. 1913, secs. 6272-6276. That treaties are to be construed in a liberal method so as to protect citizens and subjects of both countries is held in *Doehrel v. Hillmer,* 102 Ia. 169; *Geofroy v. Riggs,* 133 U. S. 258. A case much like this arose in Illinois (*Scharpf v. Schmidt,* 172 Ill. 255), in which it was held that the provision that the "term may be reasonably prolonged," used in a like treaty,

means that the courts in passing on their rights may allow the alien heirs such time, in addition to the two years limitation, as is reasonable under the circumstances, to enable them to sell. Other cases are cited in the opinion in that case, and the topic is considered in *Ehrlich v. Weber*, 114 Tenn. 711; *Kull v. Kull*, 37 Hun (N. Y.) 476; 1 R. C. L. 806; and in a note to *Ahrens v. Ahrens*, 144 Ia. 486, in Am. Ann. Cas. 1912A, 1098.

Under our statute the administrator is entitled to possession of real estate pending administration. Not until eight months after the two year period had expired was the decree rendered which found that Mrs. Hamernik was the sole heir of the deceased. Within 15 days thereafter she disposed of the property to a *bona fide* purchaser, and through him the plaintiff and other appellees derive their interest in the property. Having in mind the peculiar facts as to illegitimacy and other circumstances in the case, following the rule of liberal construction, and considering the policy of the state as shown by the statute, we are of opinion that the prolongation of the term from December 24, 1911, to September 10, 1912, was not unreasonable, and that Mrs. Hamernik had the right to sell and dispose of the property at the latter date.

We find no error in the judgment of the district court on the facts set forth in the pleading, and it is therefore

AFFIRMED.

HAMER, J., concurring.

I concur in the conclusion of the majority opinion as I understand it. In the 47 years which I have spent endeavoring to follow and understand the decisions of this court, perhaps no more important question has been considered than that disposed of in this case. I believe that the district court has jurisdiction in the first instance to try title to land, and that the jurisdiction of the county court is confined in land cases to such subjects as may be properly considered in the adjudication of probate matters. I do not believe that title to land should pass under the de-

cree alone of the county court adjudicating heirship. A controversy between heirs or devisees concerning title to real estate should always be first determined by the district court, which alone has original jurisdiction to try title to land.

Much of the business of the county court is of a probate character, and the proceedings are often nearly or quite *ex parte*. They may be without actual notice to the real parties in interest. I believe that the exclusive jurisdiction of the county court is confined, where the title to land is sought to be brought in question, to the disposition of matters of probate, and that such jurisdiction should not be extended so as to oust the jurisdiction of the district court concerning the matters in which the title to land is in dispute. I so construe the decision which we have rendered.

I write this to avoid ambiguity and to make my position manifest and clear.

EDWARD A. VANDERLIP, APPELLANT, V. DURASTUS T. BARNES ET AL., APPELLEES.

FILED JULY 14, 1917. No. 19932.

1. **Set-Off.** It is universally held by all courts, at least by all courts in countries where the English language is used, that claims for damages for torts cannot be offset against promissory notes. The statute specifically provides what claims of a defendant against the plaintiff may be made the subject of set-off or counterclaim, and also makes plain what cross-demands shall compensate each other. A judgment may be set off against another judgment or against a claim upon contract.

2. **Assignments:** CHOSE IN ACTION: RIGHTS TRANSFERRED. The owner of an ordinary chose in action cannot sell and transfer a greater right therein than he himself has, but he can sell whatever interest he has therein, and, in the absence of fraud, the purchaser will take whatever right the seller had at the time of the sale, and the seller may afterwards formally transfer the right pursuant to his agreement.

3. **Fraudulent Conveyances:** TRANSFERS: CONSIDERATION. When there is "no mutual fraudulent intent," any person, solvent or insolvent, may dispose of his property for a valuable consideration as he desires, and the consideration for the transfer may be future services which have been agreed upon between the parties.
4. **Attorney and Client:** JUDGMENT: LIEN. The lien of an attorney upon a judgment obtained by him is allowed and regulated by statute. In this case the attorneys did not comply with the statute, and have no attorneys' lien on the judgment. Under the evidence they are the owners of the judgment.

APPEAL from the district court for Lancaster county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

T. J. Doyle, for appellant.

Reese, Reese & Stout, contra.

SEDGWICK, J.

The defendant Barnes obtained a judgment in the district court for Lancaster county against the plaintiff Vanderlip upon a promissory note given for money loaned. While that action was pending the plaintiff Vanderlip brought an action against the defendant Barnes in the district court for Lancaster county to recover damages for the alleged alienation of the affections of the wife of the plaintiff Vanderlip. In that action the plaintiff Vanderlip recovered a judgment for $5,000 damages, which was afterwards reduced to $3,000 and affirmed by this court. The plaintiff then began this action against the defendant Barnes and his attorneys, Strode & Beghtol, who claimed to be the owners of the judgment in favor of the defendant Barnes, and the sheriff of Lancaster county, Nebraska, to offset the one judgment against the other, and to restrain in the meantime the enforcement of the judgment in favor of Barnes; execution for that purpose then being in the hands of the sheriff. The trial resulted in a judgment for the defendants, from which the plaintiff Vanderlip has appealed. In the case at bar the defendants answered that, before the commencement of any of these proceedings, the note upon which Barnes recovered his judgment against Vanderlip was past due and unpaid.

The plaintiff contends that under the evidence in the case the court should have entered judgment for the plaintiff. He quotes in his brief what he alleges was the oral evidence in the case, as follows: Mr. Strode testified: "In a conversation with Barnes before being employed as attorney, Barnes stated that they (Vanderlips) were threatening to sue him for alienation of the affections of Vanderlip's wife. He had loaned Vanderlip some money; taken Vanderlip's promissory note. The note was due, and he knew that, if he started to collect the money, they would try to offset it, or pay it by this loss of affection, and he wanted advice as to what he should do, and particularly about the note. He stated that this note was about all he had to pay for our services in this litigation, not only in the matter of collecting the note, in his suit to collect it, but in the other litigation that was threatening at that time to break out in various spots, and he wanted to know if we would take that note or proceeds of the note for our compensation, as far as it would go, and, if our services were not worth the amount of the note, why, of course, we would account to him for the difference. Nobody knew just what scope or how far it would go at that time. We made that sort of an agreement with him, and brought suit on the note. Soon after the suit was brought on the note, Vanderlip sued Barnes for the loss of his wife's affection for $25,000. That case required a good deal of attention. Vanderlip got a judgment against Barnes for $5,000 in the case in district court. That was afterwards reduced to $3,000 in the supreme court." And from Mr. Beghtol's testimony he quotes as follows: "When he first talked with Barnes about the matter, Barnes did not have the note with him. He said the note was in the Bank of Hickman, and that the cashier of the bank had notified him that he must take the note up on his indorsement because Mr. Vanderlip refused to pay. And it was that thing, I think, which brought him up to us at the time which he came." A few days after the judgment was obtained by the plaintiff against Barnes, Strode & Beghtol

filed in the case what they styled "Notice of Attorneys' Lien," as follows: "Notice is hereby given that E. C. Strode and M. V. Beghtol have and claim a lien on the judgment recovered in this action and on the proceeds thereof in the amount of all the said judgment for attorneys' fees for the services of said parties by reason of an agreement between said E. C. Strode and M. V. Beghtol and D. T. Barnes." And soon afterwards they filed in the case an assignment by Barnes of the judgment which he obtained against Vanderlip, wherein he recited that for "services rendered" and services to be rendered by E. C. Strode and M. V. Beghtol he assigned to them "all of his right, title, and interest in and to" the judgment which he had obtained against Vanderlip, describing it.

We are required to determine whether this evidence will support the judgment entered. The paper denominated "Notice of Attorneys' Lien" was filed after the judgments were rendered. And the written assignment of the judgment was filed still later. From these facts plaintiff's brief derives the following: "(a) The right of set-off was complete at least eleven days before any notice of lien. (b) The attorney only has a lien for services rendered in the case in which lien is claimed. No lien was ever asserted for the value of those services alone. (c) The assignee has no greater right than the assignor. It follows as an inevitable sequence the right of set-off is not affected by the assignment."

The paper denominated "Notice of Attorneys' Lien" is not in fact a notice of lien under the statute, Rev. St. 1913, sec. 272, but is in reality a notice that the attorneys claim to own the judgment, not for services rendered in the case in which the judgment is obtained, but "by reason of an agreement." These defendants cannot claim the proceeds of this judgment by virtue of the statute which gives them a lien thereon. Their claim is based upon a purchase of the note upon which the judgment is obtained, so that the question really is whether they could make such purchase and obtain title in the face of the attempts that this plain-

tiff was making to offset his claim for tort against the note. It is universally held by all courts, at least by all courts in countries where the English language is used, that claims for damages for torts cannot be offset against promissory notes. It may be, and probably is, true that in some cases injustice follows from this universal rule, and it may be possible that some legislation is required to enable the courts to do justice in special cases. In our state, and in the other code states, the statute specifically provides what claims of a defendant against the plaintiff may be made the subject of set-off or counterclaim. "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." Rev. St. 1913, sec. 7676. "The counterclaim mentioned in the next preceding section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Rev. St. 1913, sec. 7673. The statute also makes plain what cross-demands shall compensate each other, and limits it entirely to cases in which, "if one had brought an action against the other a counterclaim or set-off could have been set up." Rev. St. 1913, sec. 7678. Therefore, without further legislation, a defendant cannot set off damages in tort against a claim on contract, nor can he cause one of such claims to compensate the other. After his claim was reduced to judgment it might by the express provision of the statute be set off in satisfaction of the judgment against him, so far as the other judgment was at that time the property of the owner of the judgment against himself. It seems to follow that the question in this case is whether the judgment in favor of this defendant Barnes and against this plaintiff Vanderlip was the property of Barnes when this action was begun to offset the one judgment against the other.

The plaintiff correctly says "that the assignee of a claim has no greater rights therein than the assignor;" that is, the owner of an ordinary chose in action cannot sell and transfer a greater right therein than he himself has, but he can sell whatever interest he has therein, and, in the absence of fraud, the purchaser will take whatever right the seller had at the time of the sale, and the seller may afterwards formally transfer the right pursuant to his agreement. This court has decided that, when there is "no mutual fraudulent intent," any person, solvent or insolvent, may dispose of his property for a valuable consideration as he desires, and that the consideration for the transfer may be future services which have been agreed upon between the parties. *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130.

In addition to the uncontradicted testimony which we have already quoted, there was undisputed evidence that the value of the services rendered by the assignees of this judgment under their contract with their assignor was about equal to the amount of the judgment. These services in pursuance to their contract were rendered before this action to make the one judgment compensate the other was begun. The decision therefore in *Farmers & Merchants Nat. Bank v. Mosher, supra,* is applicable and decisive of this case.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., and LETTON and ROSE, JJ., not participating.

P. CHARLES TANKERSLEY, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JULY 14, 1917. No. 19432.

1. **Accord and Satisfaction:** JOINT TORT-FEASORS: SETTLEMENT: SUPPLEMENTAL PETITION. In a suit against two joint tort-feasors for

personal injuries, one of them may settle with the plaintiff, and, in case the settlement is not in full satisfaction for the injury, the suit may proceed against the other; but the plaintiff should not be permitted to plead the settlement and the amount paid by a supplemental petition. Such supplemental petition should be stricken from the files on defendant's motion.

2. **Appeal:** PREJUDICIAL ERROR: STATEMENTS OF COUNSEL. It is prejudicial error to allow counsel for the plaintiff to state to the jury the fact of such settlement, its terms, and the amount paid by the settling defendant, as such statement tends to show an admission of negligence as against the nonsettling defendant.

3. **Evidence:** ADMISSIBILITY: PHOTOGRAPHS. Photographs of the place and surroundings where the accident occurred, which are taken some two years afterwards, and long after such place and surroundings have been materially changed, are not ordinarily admissible in evidence.

4. **Trial:** INSTRUCTIONS: PHOTOGRAPHS. But if it becomes necessary to use such photographs in evidence, it is the duty of the court to give the jury such instructions regarding them as will insure the defendant a fair trial.

5. **Negligence:** EVIDENCE: REPAIRS. "Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence." *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

Field, Ricketts & Ricketts and *G. L. De Lacy,* for appellant.

Berge & McCarty, contra.

HAMER, J.

This is an appeal from a judgment in favor of one P. Charles Tankersley for personal injuries alleged to have been sustained by him for negligence on the part of the Lincoln Traction Company. The facts briefly stated are as follows: The Lincoln, Capital Beach & Milford Railway Company, a corporation entirely distinct from the Lincoln Traction Company, was incorporated prior to September, 1906, for the purpose of constructing and operating an electric railway west from the city of Lincoln to Capital Beach and other points further west. On

the 15th day of September, 1906, The Lincoln, Capital Beach & Milford Railway Company, entered into a contract with the Burlington Railroad Company, pursuant to which the Burlington installed and thereafter maintained a signal system at the intersection of the highway known as P street with the Burlington right of way. The expense of the installation and maintenance was and is paid by the Capital Beach Company. This signal system consisted of semaphores about 2,000 feet from the crossing in either direction and near the Burlington track. These semaphores were operated by two wires attached to the base of a vertical post by means of an arm or gate about 16 feet long attached to the same post. This gate was about six feet above the level of the ground and stood in a horizontal position. When the gate was turned across the Burlington track, the wires were made taut so as to raise the semaphores to a horizontal position and thereby warn an approaching train that the crossing was occupied. There are two of these wires. The vertical post is on the Burlington right of way about six feet east of the east rail of the track and about the same distance from the north line of the highway. At the foot of the vertical post was a box about three feet square. At the time of the injury the wires emerged from this box, and for a space of about three feet before they entered a duct, which carried them under the public crossing, were exposed. It was at the point of this exposure that the plaintiff was injured. When the gate was in its normal position it stood at right angles across the Beach Company's track. It was only changed from this position when a car on the Beach Company's track was crossing the tracks of the Burlington. About the center of the arm or gate was a box in which a red light was maintained at night as a warning of danger. Immediately adjacent to this gate the Burlington maintained a public crossing over its tracks, planked, level with the top of its rails, with good approaches, for a width of 29 feet. Several feet above the horizontal gate or arm was

a short arm some 4 or 5 feet in length which pointed in the same direction as the gate or arm, and had painted upon it in large letters the word "Stop." Within a few feet of the vertical post to which the arm or gate was attached, and by means of which the wires were made to operate the semaphores, was another post. On this post five electric lights were installed and maintained in a vertical row. These lights were kept lighted in the nighttime.

On the 14th day of May, 1907, the Lincoln Traction Company, entered into an operating contract with the Beach Company. By the terms of this contract the Traction Company agreed to furnish and operate cars, as agent of the Beach Company, over its tracks constructed to Capital Beach west of the city. The Traction Company was to receive 2½ cents per kilowatt hour for current, and actual expense for labor and material necessary in the operation of the cars. It was to collect all fares, deduct therefrom the cost of current and operating expense, and render a monthly statement to the Beach Company. It was not to be liable for injuries or damages in operating cars over the Beach Company's line. Profits were first to be applied to damages recovered, if any, and extraordinary repairs. Employees were to be discharged on written request of the Beach Company. The net balance arising from fares after deducting the above was equally divided between the Traction Company and the Beach Company. The contract contained other details not material to the instant case. At the time of the alleged injury the Traction Company was operating cars under this contract on the Beach line. It sustained no other relation to that company, the Burlington Company, or the signal system than that which can be inferred from its compliance with this operating contract. It had no authority, nor was any delegated to it, to modify or meddle with the signal system, or the wires which caused plaintiff's injury. The signal system, including the wires, was installed and maintained by the

Burlington on its right of way. The Beach Company paid the expense of the installation and the maintenance. After the Traction Company entered into the operating contract with the Beach Company the bills for maintenance were sent to the Beach Company, but actually paid by the Traction Company out of the Beach Company's earnings under the operating contract, and charged to the Beach Company in the monthly statements rendered that company.

At the time of the plaintiff's injury, and for more than a month prior thereto, cars on the Beach Company's track were operated only as far west as the Burlington track, which was then its western terminal. There was on the rail of the Beach Company's track, 50 feet east of the Burlington's east rail, a derailing frog, so that the Traction Company's car could not approach closer than a point 50 feet east of the east rail of the Burlington track without being derailed. By reason of this fact the rear platform of an approaching car would stop about 75 feet east of the offending wires. The plaintiff, when he arrived, safely alighted, and says he walked rapidly straight west, passed under the warning gate, and was tripped by the wires which operate the semaphores. It is claimed that a path had been created, which the plaintiff was following. The alleged path, however, was not well defined, and was rough and obstructed, and no effort had been made to make a safe walk at the point in question. The path, if any, was created subsequent to the time the wires and the signal system had been installed by the Burlington at the point in question, and persons who created it, such as it was, had to walk or step over these wires. It appears that plaintiff was tripped by and fell over these wires and was injured. Immediately adjacent to the wires and gate was a good crossing maintained by the Burlington, pursuant to statute, for the accommodation of the public. After the injury the Burlington boxed the wires at the point where they were exposed, and this fact was used by plaintiff in

the trial of the case as an admission that it was negligence to leave the wires exposed.

After the jury had been placed in the box and the *voir dire* examination made, the plaintiff settled with the Burlington for $3,200. Before any evidence was offered the plaintiff filed a supplemental petition setting up this settlement and the amount agreed to be paid by the Burlington on account of its negligence. The Traction Company moved to strike this supplemental petition from the files, for the reason that the matter therein set forth did not come within the province of a supplemental petition. The motion was overruled. It was thus disclosed that the Burlington settled and confessed judgment in behalf of the plaintiff for the sum of $3,200.

The same question was canvassed by the court in instruction No. 18, and the jury were there told the amount that the Burlington had paid in satisfaction of its admitted liability to the plaintiff. This instruction was excepted to. The jury returned a verdict in favor of the plaintiff and against the Traction Company for $6,400, and then recited that they deducted $3,200, the amount for which the Burlington had confessed judgment, leaving the verdict against the Traction Company $3,200. A motion for a new trial was filed and overruled, and judgment entered against the Traction Company. This appeal is prosecuted for the purpose of reversing that judgment.

The appellant's first two assignments of error are: The court erred in refusing to strike the plaintiff's supplemental petition from the files; and the court erred in permitting it to be disclosed to the jury that plaintiff had settled with the Burlington Railroad Company, and the amount of the settlement. These assignments of error will be considered together.

1. It is well settled by a decision of this court that, when two joint tort-feasors are sued, the plaintiff may settle with one of them and the action may proceed against the other. *Fitzgerald v. Union Stock Yards Co.,*

89 Neb. 393; *Bloss v. Plymale,* 3 W. Va. 393, 100 Am. Dec. 752. Where such a course is pursued, it is the duty of the court to establish a rule of procedure that will insure a fair and impartial trial to the nonsettling party. To permit the plaintiff in such a case to plead the settlement, the terms thereof, and the amount paid by the settling party would have the effect of a confession by the joint tort-feasor of the negligence complained of by the plaintiff, and the jury would at once assume that the nonsettling defendant was liable for the same amount of damages. It would seem from our examination of the record that such was the effect produced on the jury in this case.

There is another reason why the supplemental petition should have been stricken from the files. Section 7717, Rev. St. 1913, provides, in substance, that negotiations looking to a settlement between litigants cannot be disclosed to the jury on the trial of the merits. This expression of the legislature would seem to apply with full force in this case. The consideration of such a settlement and its effects is for the court, and not for the jury.

2. Appellant contends that it was error to offer evidence that the Burlington Company boxed their wires immediately after the accident occurred and to permit plaintiff's counsel to make the statement which follows in the opening address to the jury: "I will say to you, also, the evidence will show since that time those wires have been boxed up and the ground filled up, so the danger has been removed after Mr. Tankersley was injured." We think this contention is well founded. *Pribbeno v. Chicago, B. & Q. R. Co.,* 81 Neb. 657.

In that case it is said in the syllabus: "Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence." In the body of the opinion it is said: "Over defendants' objection, plaintiff was permitted to prove that subsequent to the flood de-

fendants 'lengthened the bridge and took out the ground so the water could go through.' Defendants not only objected to the testimony, but moved to strike it out of the record, so the court was well advised that defendants insisted the evidence was incompetent." Judge Root, who prepared the opinion of this court, said: "The testimony would naturally impel the jurors to believe the railway company had ascertained its fault and was endeavoring to repair its dereliction; hence without question it had admitted its negligence." He further said: "We believe logic, reason and sound public policy direct that we follow the rule adopted by the majority of the state courts." He cites many authorities, from some of which we may briefly quote. We will only refer to a part of the authorities which he cites. 1 Elliott, Evidence, sec. 228; *Standard Oil Co. v. Tierney,* 92 Ky. 367, 36 Am. St. Rep. 595; *Nalley v. Hartford Carpet Co.,* 51 Conn. 524; *Sappenfield v. Main Street & A. P. Co.,* 91 Cal. 48; *Corcoran v. Village of Peekskill,* 108 N. Y. 151; *Hodges v. Percival,* 132 Ill. 53; *Shinners v. Proprietors of Locks & Canals,* 154 Mass. 168; *Anson v. Evans,* 19 Colo. 274; *Sievers v. Peters Box & Lumber Co.,* 151 Ind. 642; *Sylvester v. Town of Casey,* 110 Ia. 256; *Terre Haute & I. R. Co. v. Clem,* 123 Ind. 15; *Getty v. Town of Hamlin,* 127 N. Y. 636; *Morse v. Minneapolis & St. L. R. Co.,* 30 Minn. 465; *Missouri P. R. Co. v. Hennessey,* 75 Tex. 155; *Georgia S. R. Co. v. Cartledge,* 116 Ga. 164; *Columbia & P. S. R. Co. v. Hawthorne,* 144 U. S. 202.

In *Standard Oil Co. v. Tierney, supra,* it was held that evidence that the defendant had taken certain precautions calculated to prevent a repetition of the injuries was not admissible.

In *Nalley v. Hartford Carpet Co., supra,* it was held that evidence of safeguards placed after the accident was not admissible for the purpose of showing prior negligence.

In *Sappenfield v. Main Street & A. P. Co., supra,* it was held that evidence of the substitution of a safer appliance after the accident was not competent.

In *Corcoran v. Village of Peekskill, supra,* it was held that the reception of evidence on the part of the plaintiff that after the accident the owner of the premises built a fence around the area to prevent persons from falling into it was incompetent.

In *Hodges v. Percival, supra,* it was held: "New measures or devices adopted after the accident do not necessarily imply that all previous ones were insufficient."

In *Shinners v. Proprietors of Locks & Canals, supra,* it was held: "If an accident happens through the alleged negligence of an employer, his subsequent acts in taking additional precautions to prevent other accidents are not admissible in evidence, in an action against him for the injuries occasioned."

In *Anson v. Evans, supra,* it was held that the subsequent conduct of the defendant could not be shown for the purpose of establishing antecedent negligence.

In *Sievers v. Peters Box & Lumber Co., supra,* it was held that evidence of repairs made after the injury had been sustained was not admissible to show antecedent negligence.

In *Sylvester v. Town of Casey, supra,* it was held that evidence of subsequent repairs of the sidewalk was inadmissible to show the negligence of the city.

3. It is contended that the court erred in admitting the photographs, exhibits 1 to 6, in evidence over the objections of the defendant. It clearly appears, and is in fact conceded, that these photographs were taken more than a year after the accident occurred, and after the changes in the *locus in quo* were made. Whatever may be the rule in other states, this court has decided in *Pribbeno v. Chicago, B. & Q. R. Co.,* 81 Neb. 657, that such photographs are not ordinarily admissible. The majority of the courts of other states so hold. In a note to *Alcott v. Public Service Corporation,* 32 L. R. A. n. s. 1084, 1127 (78 N. J. Law, 482), the authorities are collated which clearly show that the photographs were inadmissible to show changes or repairs made after the ac-

cident. It appears, however, that the purpose of introducing the photographs was not to show that changes or repairs had been made, but for the purpose of showing the platform, the pathway, the location of the crossing arm, etc. If proper instructions had been given confining the consideration of the pictures to such purposes, probably no error would have occurred, but no such instructions were given in the case.

The record clearly shows that defendant did not have a fair trial, and for this reason the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

MORRISSEY, C. J., and SEDGWICK, J., not sitting.

CHARLES GUIGNON V. STATE OF NEBRASKA.

FILED JULY 14, 1917. No. 20006.

1. **Information: CONVICTION: EVIDENCE.** Under our statute (Rev. St. 1913, sec. 8579) the procuring, aiding, and abetting the commission of a felony is a distinct offense, and, upon an information charging that offense, a conviction of the principal offense cannot be sustained; but there may be a conviction of the crime charged, if sufficiently proved, although the evidence may also prove the defendant guilty of the principal offense.

2. ———: **VENUE: OBJECTION.** If the information alleges facts showing that the crime charged was committed in the county of the trial, it will not, after conviction, be held insufficient for not formally stating the venue, when no objection and no protest was made before the trial.

ERROR to the district court for Hall county: JAMES N. PAUL, JUDGE. *Affirmed.*

C. J. Southard and *J. L. Cleary,* for plaintiff in error.

Willis E. Reed, Attorney General, and *Charles S. Roe, contra.*

HAMER, J.

This is a proceeding in error by Charles Guignon from the judgment of the district court for Hall county, by which judgment he, the said Guignon, was on the 7th day of December, 1916, sentenced to imprisonment for an indeterminate period of not less than 3 years nor more than 15, and to pay the cost of prosecution. There was a charge against him and John Reed in said court, made by the county attorney of Hall county, Benjamin J. Cunningham, and under which he, said Guignon, was adjudged to be guilty and to suffer said imprisonment. The charge was: "That John Doe, whose real name is unknown, late of the county aforesaid (Hall) on the 16th day of October, A. D. 1916, in the county of Hall and the state of Nebraska aforesaid, in and upon one John Hicks, then and there being unlawfully, feloniously, and forcibly and by violence, did make an assault, and him, the said John Hicks, did put in bodily fear, and from the person and against the will of him, the said John Hicks then and there, forcibly and by violence, and feloniously did steal, take, and carry away one pocketbook of the value of one dollar ($1.00), one United States five-dollar bill ($5.00), and silver coins to the amount of three dollars ($3.00), all of the value of eight dollars and fifty cents ($8.50) of the property, goods, and chattels of the said John Hicks; and before said robbery and felony were committed by the said John Doe, whose real name is unknown, to wit, on the 16th day of October, 1916, Charles Guignon and John Reed unlawfully, purposely, and feloniously did procure, incite, abet, and aid the said John Doe, whose real name is unknown, in the perpetrating of said robbery in the aforesaid manner and form."

The record shows that the county attorney of Hall county, Benjamin J. Cunningham, and William Suhr appeared in court on behalf of the state, and that the defendant, Charles Guignon, appeared in person, accompanied by his counsel, J. L. Cleary and C. J. Southard, and making no objection to the charge, "thereupon the

said defendant waived arraignment and the reading of the information filed therein, and to the charges of said information entered a plea of 'not guilty,' and states that he is ready for trial."

The evidence taken at the trial shows, as stated in the brief of plaintiff in error, that John Hicks, the witness who complains of being robbed, came to Grand Island Saturday night with the defendant, Jack Reed; that on the day following (Sunday evening), October 16, 1916, he went out in a taxi with Jack Reed and three other fellows, in the car of plaintiff in error, and which was driven by him; that, coming back to town, the witness rode in the back seat with Jack Reed and one other fellow, and Guignon was driving, and the same party rode with him in the front seat; that Guignon drove south off the main road, and then claimed he had a flat tire and stopped, and then all got out, and the fellow that was riding in the front seat with Guignon told witness to pull out his money, the fellow that had the gun, the fellow in the front seat with Guignon, said: "Pull out your money." Witness gave him his billbook and $2 and Jack Reed said: "Where is your pouch?" Witness stated that he was sure Guignon was standing there out of the car. John Reed, a witness for the state, testified that he and Hicks went to Harmony Hall in Guignon's car the night of the robbery; coming back, the witness, Hicks, and Smith were in the back seat, and Guignon and the short fellow in the front seat, Guignon driving; the car turned off the road about a half mile, and the short fellow "stuck us up;" that Guignon got out of the car and stayed right beside witness and Hicks.

The evidence which we have quoted is conclusive to the effect that plaintiff in error was driving the car and turned off of the road to town; that he stopped the car, claiming he had a flat tire, and got out with the others; that the robbery immediately took place in the actual presence of the plaintiff in error. None of this testimony is disputed. John Reed testified that he was one of the

parties that was held up, and that he lost "80 cents, somewhere about 80 cents." Reed asked Guignon what the fare was to Harmony Hall, and Guignon said it was paid. The witness did not know whether they split the money or not. He was asked: "Q. Doe is the fellow that sat in the back seat with you that night? A. Yes, sir." The county attorney, Benjamin J. Cunningham, testified that he talked with Guignon, who denied that there had been any shooting about the car that night. The county attorney testified that he asked Guignon why the shooting took place, and Guignon said: "Just to see him run." The county attorney testified that the affair happened in Hall county, Nebraska; that it was about a quarter of a mile west and a quarter of a mile south of Harmony Hall. William Pierce testified that Guignon had told him that he had a couple of "chumps," and he wanted Pierce to go with him; that he had told Guignon he did not want to go; Guignon said he was going to Harmony Hall. He also testified that Guignon had a gun in his coat pocket, and that he was going to get "these fellows out there." The witness testified that he had been asked by Guignon to go and see Jack Smith, and see if there was any way out of it. He wanted to know if the witness could get Jack Smith out of the road. No testimony was offered for the defense.

The verdict rendered, omitting the title and the term of the court, is as follows: "We the jury in this case, being duly impaneled and sworn, do find and say that the defendant, Charles Guignon, is guilty of the crime as charged in the information, and do find the value of the property taken to be $8.50. (Signed) L. P. Mullen, Foreman."

Guignon, by his counsel, C. J. Southard and J. L. Cleary, filed a motion for a new trial, which was overruled.

The defendant was tried and convicted on the statutory charge of procuring, aiding, and abetting another in the commission of a felony. Because, under the evi-

dence, he was present at the time of the commission of the crime, which would render him guilty as principal, it is argued that he was illegally convicted. While it is true that this court has held that procuring, aiding, and abetting a crime and the commission of it are distinct offenses, instead of being different degrees of the same offense, and that one cannot be charged with one offense and convicted of the other, it has never held that where one is charged with aiding and abetting a felony, or, as at common law, with being an accessory before the fact, and from the evidence he is found guilty as charged, the mere fact that the evidence not only shows him an aider and abettor, but goes further and shows him present when the offense was committed, and therefore guilty as principal, would operate to make the charge bad or the conviction void. In other words, the fact that a defendant is guilty of two offenses ought not to release him from the charge of being guilty of either. In *Casey v. State,* 49 Neb. 403, the defendant was charged as accessory before the fact and convicted. The case was reversed, not because the defendant was present and may have been guilty as principal, but because, as stated by Judge Post in his opinion, there was no evidence whatever of any act on the part of the defendant as aider or abettor of the crime charged. In other words, it was held that defendant could not be charged as accessory and convicted as principal. James Casey was charged with inciting, procuring, aiding, and abetting John Casey to commit the robbery charged. The only evidence against James Casey tended to show him guilty as a principal. There was therefore no evidence to sustain his conviction. The case consequently is not in point.

Section 8579, Rev. St. 1913, provides: "Whoever shall aid, abet, or procure any other person to commit any felony, shall, upon conviction thereof, be imprisoned in the penitentiary for any time between the respective periods for which the principal offenders could be imprisoned for the principal offense; or, if such principal offender would, on conviction, be punishable with death,

or be imprisoned for life, then such aider, abettor, or procurer shall be punished with death or be imprisoned for life, the same as the principal offender would be."

In *Brinegar v. State,* 82 Neb. 558, it is said: "An aider or abettor may be one who so far participates in the commission of a crime as to be present for the purpose of assisting therein, if necessary. In such a case he will also be liable as principal." Guignon was liable as an aider and an abettor, and also as a principal. He is shown by the evidence to have been the originator of the plan of the robbery, and he was an active participant in its execution. He appears to have been guilty as an aider and abettor, and also as a principal.

In *Lamb v. State,* 69 Neb. 212, 218, Lamb was charged with aiding, abetting, and procuring one Harry Hill and Verne Stewart to steal 10 head of steers belonging to Rooney & Company. The evidence showed that Lamb procured Hill and Stewart to take the steers. Hill and Stewart put the stolen steers in the shipping yard. Lamb took these steers along with his own cattle and shipped them to Omaha. He was held guilty of feloniously and purposely aiding and abetting and procuring the thieves to commit the crime. At the same time he is shown by the evidence to have participated in the theft by removing the cattle to Omaha. Judge Sullivan, in delivering the opinion of this court in *Lamb v. State,* said: "Besides the evidence was quite sufficient to establish *prima facie* the existence of a common purpose and design to steal and sell the Rooney cattle. The sale had not yet been made. The conspiracy was still pending, and consequently the acts and declarations of each of the conspirators in the prosecution of the unlawful enterprise, or with reference to it, were the acts and declarations of all."

Dixon v. State, 46 Neb. 298, is not in point. In that case an abortion was committed. It was claimed that the defendant was present and participated in the commission of the criminal act. He was therefore liable as a principal, and section 1 of the Criminal Code relating

to aiding, abetting, and procuring another to commit a felony did not apply because the defendant was himself a principal, and was not alleged to be an aider and abettor.

In *Oerter v. State,* 57 Neb. 135, the court, by Ragan, Commissioner, said: "The prisoner was indicted for one crime. He could not be lawfully convicted of another and different crime for which he was not indicted." In that case there was no charge of aiding and abetting or procuring, and therefore it was improper to instruct the jury that they could find the defendant guilty of aiding, abetting, or procuring.

In *Noland v. State,* 19 Ohio St. 131, it was held: "By the thirty-sixth section of the act providing for the punishment of crimes, aiding, abetting, or procuring a crime to be committed is made a substantive independent offense, and it is not necessary the principal should be convicted before the accessory is tried." The question here presented, as to whether the defendant might be found guilty of either offense, was not considered in the Ohio case. Alleged violators of the law in this state are to be tried under the statutes defining the offenses charged against them. Section 8579 should be given an interpretation consistent with the position of our state in regard to the conditions of the common law. We should not seek to extend the common law where our statutes and our Constitution never intended it should go. Section 3697, Rev. St. 1913, provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be the law within the state of Nebraska." The law of the state always should control. It is so provided in this section. Section 8567, Rev. St. 1913, provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed, with a view to promote its

object and assist the parties in obtaining justice." Just as plainly as the legislature could say it, it is said that the will of the people, as expressed by their representatives in the legislature, shall be the law of the state, and that the common law shall not be allowed to encroach upon it.

Objection is made by the defendant Guignon that the information fails to state the venue. It alleges that an assault was made in Hall county by John Doe upon John Hicks, and the taking from Hicks of his pocketbook and money by the said John Doe in Hall county. The assault and the taking of the pocketbook and the money are all alleged to have been on the 16th day of October, 1916. It is also alleged that "Charles Guignon and John Reed unlawfully, purposely, and feloniously did procure, incite, abet, and aid the said John Doe, whose real name is unknown, in the perpetration of said robbery in the aforesaid manner and form." What Guignon and Reed did was, in the absence of any statement to the contrary, presumably done in Hall county. In any event, if the defendant made no objection to the form of the information and pleaded not guilty, he cannot wait until he sees whether he is acquitted before he makes the objection which he here seeks to make. Because he failed to object he waived the objection which he might perhaps have made at the proper time. While the information does not affirmatively show that the robbery was committed in Hall county, no objection was made until after the trial. It comes too late at this time. *Emery v. State,* 78 Neb. 547; *Johnson v. State,* 53 Neb. 103; *Korth v. State,* 46 Neb. 631; *Bailen v. Badger Import Co.,* 99 Neb. 24; *Davis v. State,* 31 Neb. 247.

The judgment of the district court is right, and it is

AFFIRMED.

ROSE, J., not sitting.

SEDGWICK, J., concurring.

The defendant was tried and convicted on the statutory charge of procuring, aiding, and abetting another in

the commission of a felony. Because, under the evidence, he was present at the time of the commission of the crime, which would render him guilty as principal, it is argued that he was illegally convicted. This court has held that procuring, aiding, and abetting a felony and the commission of it are distinct offenses, instead of being different degrees of the same offense, and that one cannot be charged with one offense and convicted of the other; but it has never held that where one is charged with aiding and abetting a felony, or, as at common law, with being an accessory before the fact, and from the evidence he is found guilty as charged, the mere fact that the evidence not only shows him an aider and abettor, but goes farther and shows him guilty as principal also, would operate to make the charge bad or the conviction void. In other words, the fact that a defendant is guilty of two offenses ought not to release him from the charge of being guilty of either. Common-law precedents have sometimes gone to extremes to protect the rights of persons charged with crime. In *Casey v. State*, 49 Neb. 403, the case cited, the defendant was charged as accessory before the fact and convicted. The case was reversed, not because the defendant was guilty as principal, but because, as stated by Judge Post in his opinion, there was no evidence whatever of any act on the part of the defendant as aider or abettor of the crime charged. In other words, it was held that defendant could not be charged as accessory and convicted as principal. It is also claimed that the information failed to show venue. The information does show that the robbery was committed in Hall county. No complaint of the information was made until after trial. It comes too late at this time.

The propositions of the law which have been adopted by the court in the syllabus are all that is involved in the case.

For the reasons stated above, I concur in the conclusion.

LETTON, J., concurs in separate opinion of SEDGWICK, J.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1917.

JAMES M. WEBB, APPELLEE, V. OMAHA & SOUTHERN INTERURBAN RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 2, 1917. No. 19359.

1. **Carriers:** "RAILROAD COMPANY." A corporation organized under the general railroad statutes and having the power of eminent domain, whose articles of incorporation authorize it to construct and operate a railway from one city to another for the purpose of carrying passengers and freight and to perform all the duties of a common carrier, is a "railroad company," within the meaning of the statute regulating the liability of such companies for injuries to passengers. Rev. St. 1913, sec. 6052.
2. **Appeal:** INSTRUCTIONS. The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law.
3. **Damages:** PERSONAL INJURIES. In an action to recover damages for personal injuries which are permanent and have impaired the earning capacity of the plaintiff, damages awarded for pecuniary loss by reason of his decreased earning power should be based on the probable expectancy of plaintiff's life immediately before the injury, but damages awarded for future mental and physical suffering should be considered in connection with the probable expectancy of plaintiff's life in his injured condition at the time of the trial.
4. **Trial:** INSTRUCTIONS. Though an instruction may not be so specific as it should be, if it is not misleading, it is not cause for reversal, where the complaining party made no request for a more specific instruction.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

John L. Webster and *Emmet Tinley,* for appellant.

Montgomery, Hall & Young, contra.

MORRISSEY, C. J.

Plaintiff recovered a judgment for $5,000 for injuries alleged to have been sustained while a passenger on the railway operated by defendant from South Omaha to Fort Crook, and defendant appeals.

On plaintiff's behalf there was evidence tending to show that at midnight, July 4, 1911, he boarded a car at Twenty-fourth and N streets in South Omaha to go to Fort Crook; when he got on the car there were no vacant seats; passengers were standing on the rear platform and in the aisles; some one at the rear of the car called for the passengers to move forward, and plaintiff went forward to the front platform, on which several passengers were standing; two men were sitting on the front platform in the doorway on the right side of the car; plaintiff stood between them holding to the handholds; at Twenty-fourth and W streets the track made a 46-degree curve at the foot of a sharp decline which the car approached at 25 miles an hour; when nearing this point plaintiff felt some one tap his arm and ask for his fare, and he reached into his pocket for his ticket, and as he did so the car gave a sudden jerk throwing him out of the car as it was rounding the curve. Plaintiff's head was injured, and he has been unable to work, and is now subject to epileptic fits. His story of the accident is corroborated in part by several other passengers. On defendant's behalf there was testimony tending to show that the accident occurred near Albright station, a considerable distance south of the curve at which plaintiff fixed the scene of the accident; that plaintiff, who was in the middle of the car, pushed forward, saying, "Let me off;" that when he reached the front platform he stood on the lower step between the two passengers seated in the doorway, and said, "I am going to get off here," and jumped off the car, which was moving at the rate of 8 or 10 miles an hour, and fell on his back.

Defendant contends that the court erred in instructing the jury, and that the preponderance of the evidence supports defendant's theory of the case so strongly that, if properly instructed, the jury would have returned a verdict in its favor. In the petition it was alleged that defendant permitted its car to become overcrowded, and that plaintiff was pushed out upon the front platform, and that defendant caused the car to go around a curve at a dangerous, high and negligent rate of speed, and by so doing caused plaintiff to be thrown from the car. In its answer defendant denied that plaintiff was injured at the place and in the manner alleged in his petition, and charged that plaintiff, "without giving any warning of his intention, suddenly walked through the car to the front platform and recklessly and negligently jumped therefrom." After instructing the jury that it was incumbent on plaintiff to prove the allegations of his petition by a preponderance of the evidence, the trial court instructed the jury that, as to defendant's allegation that plaintiff negligently jumped from a moving car, "the burden of proof is on defendant to prove such negligence by a preponderance of the testimony," and that "if, as to such allegation of negligence, the evidence preponderates in favor of plaintiff, or is evenly balanced, then your finding as to such negligence should be for plaintiff." It is contended that this instruction is erroneous, since it requires defendant to disprove plaintiff's allegation of defendant's negligence. Whether the instruction is erroneous need not be decided, since it was not prejudicial to the rights of defendant.

The statute provides: "Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of such road actually brought to his or her notice." Rev. St. 1913, sec. 6052.

It has been held that this statute is not applicable to a street railroad company using the streets of a city

without excluding the public use thereof, and which transports "passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings or other places irregularly, as the convenience of its patrons may require, for the receipt and discharge of its passengers." *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672. While the defendant company in some respects partakes of the nature of a street railroad company, it appears to be a "railroad company," within the meaning of the statute. It is a corporation organized under the general railroad laws of this state and has the power of eminent domain. Rev. St. 1913, sec. 5940. It operates a railway from South Omaha to Fort Crook. Its articles of incorporation provide that it "may carry upon its line of railroad, passengers, baggage, freight, express and mail matter, with authority to perform all the duties of a common carrier," and may be operated by electric or by any other motive power. Within the meaning of the statute cited, the defendant company is a railroad company. *Diebold v. Kentucky Traction Co.,* 117 Ky. 146, 63 L. R. A. 637; *Anhalt v. Waterloo, C. F. & N. R. Co.,* 166 Ia. 479; *City of Aurora v. Elgin, A. & S. T. Co.,* 227 Ill. 485; *Knopf v. Lake Street E. R. Co.,* 197 Ill. 212; *Harvey v. Aurora & G. R. Co.,* 174 Ill. 295; *Metropolitan W. S. E. R. Co. v. City of Chicago,* 261 Ill. 624.

Defendant also complains of another instruction, and contends that it permits the jury to find that defendant was negligent in operating the car at a high rate of speed, and assumes that defendant was negligent because its car was crowded. For reasons already given, there was no prejudicial error in this instruction.

It is also contended that it was error to admit in evidence tables of expectancy showing plaintiff's probable expectancy of life at the time of the accident, and it is argued that future damages should be based upon plaintiff's physical condition at the time of the trial. In this connection defendant also complains of the instruction stating the measure of damages. The court instructed the

jury that, if they found that plaintiff's injuries were permanent, and that his ability to work at his usual occupations had been diminished thereby, "you may take that fact into consideration in connection with the probable duration of plaintiff's life, or such portion thereof as he would have been capable of doing such work but for his injuries, and the amount of money he was capable of earning, and, if it appear with reasonable certainty, that plaintiff will suffer pain in the future on account of such injuries, you may also consider that fact." Defendant cites *Hughes v. Chicago, R. I. & P. R. Co.*, 150 Ia. 232, and *Howell v. Lansing City E. R. Co.*, 136 Mich. 432, in which it was held that damages awarded for future mental and physical suffering must be based on the probable expectancy of plaintiff in his injured condition at the time of the trial, and not on his probable expectancy of life prior to the injury. The tables of expectancy were properly admitted to aid the jury in determining the pecuniary loss which plaintiff would sustain by reason of permanent injuries decreasing his earning power. If his earning power was lessened because his probable length of life was shortened by his injuries, he was entitled to damages therefor. On the question of recovery for future mental and physical suffering, the instruction, though not so specific as defendant contends it should be, is not misleading or inaccurate, and defendant made no request for a more specific instruction on this feature of the case.

Prejudicial error has not been shown and the judgment is therefore

AFFIRMED.

SEDGWICK, J., dissenting.

The majority opinion shows that the court instructed the jury that "the burden of proof is on defendant to prove (a certain allegation in the pleadings) by a preponderance of the testimony." The opinion says: "Whether the instruction is erroneous need not be decided, since it was not prejudicial to the rights of defendant." It then discusses the statute, and concludes that the defendant is a railroad

company, within the meaning of the statute, instead of a traction company, and for that reason the opinion concludes that the court might instruct the jury that the burden of proof upon any issue of negligence is upon the defendant.

The defendant answered by pleading the facts in regard to the manner in which it claims the accident occurred, which facts would constitute a special denial of the plaintiff's allegation in his petition, and would also constitute an allegation of contributory negligence.

It is true that in the case of railroads with the right of eminent domain, etc., the presumption as to negligence and as to contributory negligence is different from the presumption in the case of street car traction companies, under our statute and decisions, but there is no difference as to the burden of proof. The burden is in either case upon the plaintiff to prove the defendant's negligence, and is upon the defendant to prove contributory negligence of the plaintiff.

So fas as this answer and the proof thereunder constitutes a denial of negligence on the part of defendant, the burden of proof would be upon the plaintiff; that is, in establishing negligence of the defendant, the plaintiff has the burden of proof, and this is true when the denial of such negligence is a special denial. This answer alleged that the accident happened at a different place and in a manner altogether inconsistent with defendant's negligence as the cause of the accident. This, of course, is a special denial of negligence of defendant, and did not shift the burden of proof.

It seems to me to be a mistake to say that, because the defendant is a railroad company instead of a street car company, "whether the instruction is erroneous need not be decided, since it was not prejudicial to the rights of defendant."

HAMER, J., dissenting.

This is an action by a passenger to recover damages for alleged negligence upon the part of the defendant railway

company claimed to have resulted in personal injuries to the plaintiff.

As I understand the facts in this case, the plaintiff boarded one of the defendant's cars at Twenty-fourth and N streets in South Omaha, at 12 o'clock at night. He was on the way to Fort Crook. He went through the car and found two men sitting on the platform of the car with their feet out on the steps. He described these men as Fred Jenkins and Grostephan. They were soldiers. The plaintiff was himself a soldier. The plaintiff testified that he had a coupon book in his hand, and that while he was there at the front end of the car he felt a jerk and a lurch of the car. Immediately, according to his own story, he was thrown from the car or fell off. There is strong testimony which tends to show that the plaintiff got ready to get off the car, and then that he did get off. Grostephan appears to have so testified. Ross Collins, who was not a soldier, as Grostephan was, but was merely a passenger on the car testified that Webb said "Let me off here," and that then Webb jumped off. Grostephan described Webb as standing with one foot on the step of the car apparently just ready to get off. Immediately after that he got off. Webb does not deny that he first stood behind Jenkins and Grostephan, and that he then crowded in between them. Mrs. Beckstead testified that the car was moving when the plaintiff got off, and that she saw this man (the plaintiff) rolling in the street. Her testimony was corroborated by the testimony of Wilber Kast, who testified that he saw a man dressed in a soldier's uniform roll toward the pavement. Gus Bachmann also saw the man when he was rolling in the street. These witnesses were passengers, and their evidence tends to show that the plaintiff got off the car voluntarily, or that he carelessly stood at the front end of the car with one foot on the car step and another foot on the platform, and so may have fallen to the ground.

He was a young man and a soldier and his muscles should have been strong and hard. It is difficult to see how he was thrown from the car unless he was himself careless and negligent and refused to support himself by

taking hold of the guard-rail or the corner-post or the handholds. The defendant railway company denies that the plaintiff was thrown from the car at a certain street intersection, and produces testimony tending to show that the plaintiff continued to ride, and that he went a further distance of about 4,000 feet beyond where it is claimed by the plaintiff that he left the car; that the plaintiff then voluntarily stepped off or jumped off while the car was moving. Under the evidence produced on behalf of the defendant, the plaintiff may have accidentally fallen from the car by reason of the fact that it was moving rapidly, and because the plaintiff did not support himself as well as he might have done by holding on to certain supports in the front end of the car. The plaintiff is described as standing with one foot upon the car step and with another on the platform of the car. He does not dispute that he stood in this way. Of course, it is for the jury to determine under proper instructions how the plaintiff left the car. Fred E. Jenkins was a witness on behalf of the plaintiff. He was examined, and in his testimony said that he would not make the statement that Webb did not say he was going to get off "down here a little way." He described the plaintiff as going through the car and as stepping down on the lower step; that Webb left the car with his back in the direction that the car was going. He knew that Webb had one foot on the platform, but was uncertain whether the other foot "was on the upper or lower step."

The fourth instruction given by the court reads: "The defendant alleges that the injuries, if any, to plaintiff were caused by plaintiff's own negligence, and that plaintiff was negligent in that he jumped from a moving car. As to this allegation of negligence, the burden of proof is on defendant to prove such negligence by a preponderance of the testimony. If defendant has so proved, then your verdict should be for the defendant."

It will be seen that in the foregoing instruction the burden of proof is put upon the defendant. This permits the plaintiff to recover without establishing his case. The last sentence in this instruction permits the defendant to

recover only upon condition that the defendant proves the negligence of the plaintiff by a preponderance of the evidence. Under this instruction the jury might be in very much doubt as to whether the plaintiff had done anything to establish the fact that he had exercised the prudence and care of an ordinary person.

That the burden is still upon the defendant is again reiterated in the last clause of instruction No. 5, which reads: "As to defendant's allegation of plaintiff's negligence, if, as to such allegation of negligence, the evidence preponderates in favor of plaintiff, or is evenly balanced, then your finding as to such negligence should be for plaintiff." This in effect tells the jury that they may be uncertain when the evidence is all in as to whether the evidence is on the side of the plaintiff or on the side of the defendant, and that it may be evenly balanced, and that it is the duty of the jury to find for the plaintiff, notwithstanding the fact that the plaintiff has failed to establish his case, and has only succeeded in establishing an even balance.

I contend for the following: (1) An instruction which permits the plaintiff to recover without establishing his case by a preponderance of the evidence is clearly erroneous and so prejudicial that where an instruction of that kind is given the judgment should be set aside. (2) Where the evidence leaves it uncertain as to whether the plaintiff lost his balance and fell from the car when it was moving or voluntarily stepped off the car when it was so moving, the instructions of the court should so define the issues that the jury may understand that they are to find from the evidence whether the plaintiff voluntarily left the car or was thrown from it because of his negligence in standing in an unsafe place. (3) It is improper for the court, where the evidence shows that the plaintiff was probably thrown from the car because of his negligence in standing on the platform and steps when the car was in motion or voluntarily stepped from it, to instruct the jury that the burden of proof was upon the defendant to establish its defense. It is for the court to tell the jury that the burden

of proof remains upon the plaintiff to establish his case by a preponderance of the evidence, and that if he fails to do so he cannot recover. It is misleading to assume in the instructions to the jury that the defendant must prove something which the evidence leaves in doubt. It is the duty of the plaintiff to show over and above all the facts shown by the evidence that he is entitled to recover. (4) If the plaintiff stood out there on the platform at the front end of the car without holding onto such supports as were within his reach, and if one foot was on the car steps while the other was upon the platform, he may have been thrown from the car by reason of his own negligence, or, if there was negligence on the part of the conductor running the car, then the accident was due to contributory negligence; but if the plaintiff voluntarily stepped from the car he exercised his own will, and then the cause of his injury was his own independent act. (5) The district court appears to have erred because he misconceived the distinction between contributory negligence and the plaintiff's independent act of negligence in jumping from the car, and in which act, if it occurred, the defendant did not participate. (6) The district court appears to have treated the act of the plaintiff as contributory negligence if the plaintiff stepped off the car or jumped off it, and this way of treating the plaintiff's act as contributory negligence implied to the jury that the defendant had done something which contributed to the injury which he received, and for which they could render a verdict against the defendant. As there cannot be contributory negligence unless the plaintiff and the defendant each furnished a share of the same, it was clearly error upon the part of the court to tell the jury or to suggest to the jury that the defendant was liable. (7) The court should have instructed the jury that contributory negligence does not exist except in a case where there is evidence which tends to establish the negligence of the defendant, and also evidence which tends to establish co-operation on the part of the plaintiff with the negligent acts of the defendant. If the plaintiff jumped off the car, then such act was a volun-

tary act of negligence upon his part, for which the defendant could not in any way be held responsible. It was not contributory negligence, but plaintiff's voluntary act. The court should have so told the jury. (8) The prejudicial error in this case is that the court neglected and refused to submit to the jury the theory of the defendant's case. The jury should have been told that, if the defendant voluntarily got off the car when it was running and so got hurt, then he could not recover; or that, if he stepped off and did so in a negligent manner when the car was running, then he could not recover. (9) The court erred because he failed to tell the jury in any way that, if the plaintiff's injuries were the result of his own independent act, then the defendant was not liable, and that the plaintiff was responsible for the injuries which he brought upon himself. (10) There is a difference between contributory negligence and a case where the injury is the result of the plaintiff's own act, pure and simple. There can be no illustration plainer than this case itself. If the plaintiff stepped off the car when it was in motion or jumped off it, then his injury is due to the fact that he did so.

If the plaintiff by his own independent voluntary action jumped off the car or stepped from the car when it was in motion, that is the end of his case, although it does not follow that there was any contributory negligence upon the part of the defendant, but the defendant is not liable for the injury which the plaintiff brought upon himself. The district court made a distinction between the voluntary act of the plaintiff in leaving the car while it was in motion and the act of sitting or standing at the front end of the car with one foot on the platform and the other foot on one of the steps of the car. The trial court seems to have overlooked the wide difference that there is between contributory negligence and that of voluntary action upon the part of the plaintiff, which does not need any contributory negligence upon the part of the defendant to bring about an injury. The idea of the trial court as it has found expression in the instructions is that in any event the defendant is guilty of something: Perhaps, first,

that it permitted the car to be filled up; perhaps, second, that it ran the car too rapidly; perhaps, third, that there were rough places in the track. In any event no one may read these instructions without coming to the conclusion that the trial judge was unfortunate in the language used and could not have used such language without prejudicing the defendant.

If the rule contended for by the trial court is adopted by this court, and it seems to have been adopted in the majority opinion, then it will be seen that no statement concerning the facts of the accident may be given by a defendant in a personal injury case hereafter to be tried, and that in each case the only safe thing to do upon the part of the defense is to file a general denial. The rule of law which places the burden of proof upon the defendant to prove contributory negligence is distinguished from an act of independent negligence upon the part of the plaintiff by which the injury is brought upon himself. *Cincinnati Traction Co. v. Forrest,* 73 Ohio St. 1; *Cincinnati Traction Co. v. Stephens, Adm'r,* 75 Ohio St. 171.

In *McCarthy & Baldwin v. Louisville & N. R. Co.,* 102 Ala. 193, 48 Am. St. Rep. 29, it is said: "Contributory negligence exists only when the negligence of both parties has combined and concurred in producing the injury."

In *Cooper v. Georgia, C. & N. R. Co.,* 56 S. Car. 91, the court defined contributory negligence, following 7 Am. & Eng. Ency. of Law (2d ed.) p. 371: " 'Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.' It is thus seen that contributory negligence by a plaintiff can never exist except when the injury has resulted from the negligence of defendant as a concurring proximate cause."

In *Louisville & N. R. Co. v. Sights,* 121 Ky. 203, the court defined contributory negligence as follows: "Contributory negligence on the part of the plaintiff necessarily assumes negligence upon the part of the defendant."

In *Birsch v. Citizens Electric Co.*, 36 Mont. 574, the court said: "Contributory negligence on the part of plaintiff presupposes negligence on the part of the defendant. Beach, Contributory Negligence (2d ed.) sec. 64; *Wastl v. Montana Union R. Co.*, 24 Mont. 159; * * * *Moakler v. Willamette Valley R. Co.*, 18 Or. 189, 6 L. R. A. 656, 17 Am. St. Rep. 717; *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372. In *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190, it is said: 'Properly speaking, contributory negligence, as the very words import, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act, which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury.' It goes without saying, then, that an answer which denies any negligence on the part of the defendant, and alleges that the injury resulted wholly from plaintiff's negligence, does not plead contributory negligence."

The foregoing decisions sustain the proposition that it was error for the trial court to instruct the jury that the burden of proof was on the defendant to establish by a preponderance of the evidence that the plaintiff jumped from a moving car. Also, it was erroneous to instruct the jury that, if the evidence was evenly balanced on that point, then the verdict should be for the plaintiff.

LEWIS F. FAIRCHILD, APPELLANT, V. JOHN H. WILSON, APPELLEE.

FILED OCTOBER 2, 1917. No. 19615.

1. **Appeal:** MOTION FOR NEW TRIAL. If the motion for a new trial does not challenge the attention of the trial court to the inadequacy of the verdict, the point will not be considered on appeal.

2. ———: INSTRUCTIONS. "Instructions relating to the right to recover, and having no bearing on the *quantum* of damages, cannot be complained of by the plaintiff when the verdict was in his favor, and unsatisfactory only in its amount." *Hankins v. Majors*, 56 Neb. 299.

APPEAL from the district court for Keith county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Wilcox & Halligan, for appellant.

W. E. Shuman, contra.

MORRISSEY, C. J.

This was an action for damages growing out of an assault with a deadly weapon. The jury returned a verdict in favor of plaintiff. Plaintiff filed a motion for a new trial, alleging numerous errors on the part of the trial court, but not complaining of the amount of the recovery. The motion for a new trial was overruled and judgment entered on the verdict, and plaintiff has appealed.

In the brief a number of the instructions are attacked, but no complaint is made of the instruction defining the measure of damages. It is not necessary to discuss seriatim the errors alleged. Every disputed question was, by the verdict, resolved in favor of plaintiff. The sole matter of which the plaintiff might complain was the amount awarded. This was not called to the attention of the trial court by the motion for a new trial, nor is it assigned, as required by the rules of the court, in the brief. It follows that the inadequacy of the verdict cannot be considered on appeal.

The objections to the instruction given fall within the rule announced in *Hankins v. Majors,* 56 Neb. 299: "Instructions relating to the right to recover, and having no bearing on the *quantum* of damages, cannot be complained of by the plaintiff when the verdict was in his favor, and unsatisfactory only in its amount."

The judgment is

AFFIRMED.

LEE S. ESTELLE, APPELLEE, V. DAILY NEWS PUBLISHING COMPANY ET AL., APPELLANTS.

FILED OCTOBER 2, 1917. No. 20044.

1. **Appeal:** INSTRUCTIONS: REVIEW. Where instructions have been given by the district court upon the request of one of the parties to the suit, he will not afterwards be heard to complain in this court on appeal that the instructions were erroneous.
2. **Libel:** QUALIFIED PRIVILEGE. The law with regard to qualified privilege, and the necessary elements which must be shown in order to uphold a verdict for libel in such a case, laid down in the former opinion, is adhered to.
3. **Instructions** examined, and *held* to be in accordance with the law of the case.
4. **Libel:** DAMAGES: EVIDENCE. The condition and situation in life of one injured by a libel may be shown in evidence, and may be considered by the jury upon the question of the amount of damages.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Brown, Baxter & Van Dusen, Courtright, Sidner & Lee, Gurley & Fitch, Elmer E. Thomas and *Arthur G. Wray,* for appellants.

Mahoney & Kennedy, Frank Dolezal and *Stout, Rose & Wells, contra.*

LETTON, J.

It is unnecessary to set forth the facts in this case, since they are fully stated in the opinions upon a former appeal, reported in 99 Neb. 397. At that time a judgment in favor of the plaintiff was reversed and the cause remanded for trial. In the majority and concurring opinions the issues to be submitted to the jury upon another trial were fully stated. Many questions discussed in the briefs on this appeal were argued by counsel and disposed of by the opinion and judgment. It is unnecessary, therefore, to restate or reconsider the propositions of law thus settled.

On a second trial the plaintiff recovered a judgment for the sum of $10,000 against each of the defendants, and this appeal results. A large number of assignments of error have been made, but only a few propositions have been argued in the briefs or by counsel orally, and, in accordance with the settled rule of this court, those only will be noticed.

It is argued that the petition does not state a cause of action, that the publication on its face was an innocent campaign appeal, and is not susceptible of a libelous interpretation. This point was determined upon the former appeal, and it was the view of all the judges that the petition stated a cause of action.

It is next said: "Occasion determines the question of privilege. If the occasion exists, actual malice must be shown before the plaintiff can recover"—and in this connection that the cause "was submitted to the jury under instructions which left the jury as much at sea with reference to the rules of law in arriving at a verdict as if no instructions had been given." An examination of the instructions shows that the district court followed the decision of this court with reference to the questions to be submitted to the jury. Not only were such propositions submitted in the abstract, but by making reference to the facts the court directly called attention to the specific questions to be determined, in accordance with the law laid down by this court; and, furthermore, most of the instructions requested by the defendants were given either verbatim or in substance. The material facts on which the liability of the defendants depended were clearly stated.

The complaint is made that the instructions told the jury that the only inquiry for them to make was to determine whether the publication was made maliciously, and whether the readers would understand it to charge plaintiff with corruption or improper motives in his office, and practically informed the jury that they were concerned neither with the truth nor falsity of the article. It is also said that nowhere did the trial judge instruct the jury that it was necessary that they should find actual malice

on the part of the defendant before they could return a verdict for the plaintiff, and that the jury were given to understand that, if the publication charged improper motives and was malicious, yet plaintiff should recover even though the charge was true. The charge, as a whole, is not vulnerable to these criticisms. By instruction No. 17, given by the court upon its own motion, the jury were told that if they believed that the matter published was true, and that it was published for good motives and justifiable ends, the plaintiff could not recover. This statement was repeated in instruction No. 4, requested by the defendant Fellman, and included by the court in its instructions to the jury, and in instruction No. 7, requested by both defendants, and included by the court in its charge to the jury. In other instructions, included by the court in its charge and given at the request of the Daily News Publishing Company, the jury were told, in substance, that the fitness and qualifications of plaintiff "for the office which he sought and his record as judge were subjects for the freest scrutiny and investigation and comment, either by the publisher of a newspaper or by a voter or other person having an interest in the matter, and that much latitude must be allowed in the publication, for the information of the voters, of charges affecting his fitness for the office, so long as it is done in good faith and without actual malice nor will such publication be ground for damages without proof of actual malice on the part of him who published it, although it may be harsh, unjust and unnecessarily severe, provided said publication does not charge the plaintiff with a crime or with personal or official corruption." And again, in instruction No. 10, given at the request of the same defendant, it is said: "In determining whether or not defendant, the Daily News Publishing Company, was moved by actual malice in making the publication complained of, the jury should examine," etc. These instructions embody the principles of law contended for by the defendants and were given at their request. Whether strictly accurate or not, they are in no position to complain now. Upon a comparison of the charge given by the

court with the instructions requested by each of the defendants and refused, we find that every instruction requested which states a correct proposition of law was given either verbatim or in substance by the court, so that they have no room for complaint on this score. Much of the argument as to the instructions is in reality an attack upon the soundness of the law laid down in the former opinion. The questions raised were then considered and were determined adversely to appellants.

It is contended that the plaintiff's physical illness was not the direct result of the Fellman letter and was too remote to be considered by the jury in assessing damages. This contention is based upon the fact that the publication was made on the 14th of August, 1913, and no physician was called until about the 8th or 10th of September. It is shown by undisputed testimony that the first knowledge plaintiff had of the publication was by hearing his name mentioned by newsboys on the streets on the afternoon of August 14th; that he bought a paper and read it on his way home; that he suffered a severe nervous shock from the perusal of the letter; that this disturbed and interfered with his sleep, affected his appetite, and lessened his ability to work; and that these conditions progressively increased until early in September, when he was compelled to call a physician. The testimony in this respect was sufficient to justify the submission of this question to the jury.

The court gave the following instruction, on its own motion, with respect to the measure of damages: "If you find for the plaintiff you will take into account plaintiff's position in life, and who and what the third ward crowd was, as generally understood by the public, as shown by the evidence, and, in the light of these circumstances, and all the other circumstances proved at the trial, consider such damages or injury to his reputation as was caused by the publication, the mental anguish, grief, shame, humiliation or disgrace, and mental suffering, if any, caused by it, and you will allow him for said injuries, if any, such sum as would fairly compensate him for the

injury and damage sustained. You will allow no damage by way of punishment of the defendants."

The defendant Daily News Publishing Company requested the following instruction, which was given by the court as No. 13: "In determining whether or not the publication complained of caused the plaintiff to become ill, you have a right to consider the length of time lapsing between the publication and the illness, and all other facts and circumstances in evidence touching the publication, its character and scope, the business and occupation of the plaintiff during that time, and, before you can assess any damages sustained by the plaintiff for being ill, you must be convinced that said illness was caused by the publication complained of, and by no other thing."

The latter instruction was excepted to by the Daily News Publishing Company, after the charge was given, and the giving of this instruction is now assigned as error. The rule is that one who procures the giving of an instruction will not afterwards be heard to say it was erroneous. The argument of defendant upon this point is as follows:

"The reason for excepting to the instruction which the defendant had requested was that, the court having refused to strike out plaintiff's testimony in regard to his illness, the defendant supposed, of course, that he intended to submit the question of plaintiff's physical illness as one of the elements of damage; but, much to defendant's astonishment and surprise when the court gave his own instructions, he entirely excluded from the consideration of the jury the physical illness of the plaintiff as one of the elements of damage. * * * Had the defendant been apprised of the theory upon which the court was going to submit the case to the jury, so far as the measure of damages was concerned, it would not have offered instruction No. 13; and, as soon as the theory upon which the court proposed to submit the case to the jury was disclosed by the court's instructions, the defendant promptly excepted to the giving of the instruction which it had very naturally requested in view of the ruling of the court upon the admissibility of the testimony with reference to plaintiff's

physical illness. That defendant should not be bound by this instruction under the circumstances seems too clear for argument. But even under such an instruction the court must be satisfied that the verdict of the jury was in the face of the evidence, so far as it took into consideration the illness of the plaintiff as the direct, immediate and proximate effect of the publication."

The argument is ingenious, but not convincing. No doubt the court would, if requested, have informed counsel of the instruction it was about to give relating to the elements of damages. Besides, considering the charge as a whole, we are satisfied that the evidence sustains the finding that physical illness was the proximate result of the publication.

Defendant Fellman has filed a brief devoted in the main to the contention that the decisions of this court are in conflict as to the so-called "narrow" or "liberal" view of the law of libel, as applying to publications with reference to candidates for public office, and he asks that we follow the "liberal" rule announced in *Atkinson v. Detroit Free Press Co.*, 46 Mich. 341, and *Coleman v. MacLennan*, 78 Kan. 711, 20 L. R. A. n. s. 361.

Instructions No. 15, given on the court's own motion, and defendant's No. 3, heretofore alluded to on the question of malice, when considered together, allow discussion and criticism of the official record of the plaintiff as a candidate for judge of the district court, or of his fitness for the office to which he sought to be elected, and when considered with other instructions only allow recovery where false statements have been made maliciously, and not with good motives, or for justifiable ends. What more liberal rule than this could the defendants in reason ask for? In fact, they did not ask in the tendered instructions for any greater latitude. The rule laid down in the former opinion in this case is in consonance with that of most courts following the so-called liberal rule. In fact in the *MacLennan* case an instruction that, if the jury found "that said article was published with a malicious intent to wilfully wrong and injure plaintiff, then the fact that the

article is a privileged one would constitute no defense to this action," was given. We are not inclined to adopt a rule which practically takes away all responsibility for the malicious publication of that which is knowingly false, libelous and defamatory. The views of the court on this question have been clearly set forth in the opinion of Judge Sedgwick on the former appeal and will not be restated.

It is insisted that the verdict is grossly excessive, and a number of instances where verdicts of lesser amounts have been set aside or remittiturs ordered have been cited. The plaintiff in this case was nearly 65 years of age. He had lived in Nebraska since 1872. In 1884 he was elected district attorney for the judicial district in which he lived. He was appointed by the governor to fill a vacancy as judge of the district court. Afterwards, he was elected to the same position, and has held that position constantly since January, 1900. He has been department commander of the Grand Army of the Republic for the district of Nebraska. He was inspector general of the national organization. Between terms in his court work he has served engagements as a lecturer upon the Chautauqua platform. Having occupied these public positions, Judge Estelle has been more or less in the public eye in the state of Nebraska and elsewhere for many years. At the time the libel was printed he was occupying judicial office and was a candidate for reelection. The publication charged him with being associated with "the third ward crowd," which the proof shows was largely composed of thieves, gamblers, pimps, and ballot-box stuffers. The evidence shows with respect to the "Erdman case" mentioned in the publication that instead of assisting in a "frame-up" to send Erdman to the penitentiary, which is a fair implication from the published statement, Judge Estelle refused to accept a plea of guilty from Erdman when qualified by the statement that he was not able to fight the county. He appointed counsel for the defense and allowed compulsory process for witnesses. In a number of other material matters the evidence disproves the imputations and statements of the publication. The condition and station in life of one injured by a libel may

be such as greatly to aggravate the injury, and a jury is entitled to take this into account in fixing the amount of recovery. 25 Cyc. 508, and cases cited in note. The case has been twice tried and the former verdict was larger than at this trial. Under all the circumstances we are of opinion that the verdict is not excessive. *Sweeney v. Baker,* 13 W. Va. 158; *Duke v. Morning Journal Ass'n,* 120 Fed. 860; *Minter v. Bradstreet Co.,* 174 Mo. 444; *Crane v. Bennett,* 79 N. Y. Supp. 66; *Young v. Fox,* 49 N. Y. Supp. 634; *Cook v. Globe Printing Co.,* 227 Mo. 471.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

IN RE ESTATE OF JOHN O'CONNOR. JOHN T. CULAVIN, APPELLANT, V. JAMES B. O'CONNOR ET AL., APPELLEES.

FILED OCTOBER 2, 1917. No. 19422.

1. **Wills: CONTEST: EXPERT EVIDENCE: QUESTIONS FOR JURY.** In the contest of a will on the ground of forgery, the value of expert testimony on handwriting depends in a great measure on the reasons for the opinion expressed; and the weight of such testimony and the credibility of the witnesses are questions for the jury, where there is a substantial conflict in the evidence on the contested issue.

2. ———: ———: **FORGERY: SUFFICIENCY OF EVIDENCE.** In a proceeding to probate a will, contested on the ground of forgery, a finding by the jury in favor of contestants on that issue *held* to be supported by sufficient evidence, as outlined in the opinion.

3. **Evidence: IDENTIFICATION OF SIGNATURE.** In the contest of a will on the ground of forgery, the failure of the trial court to permit a witness to identify a disputed signature of a deceased person was not abuse of discretion amounting to error, where the foundation for the rejected testimony was a statement by the witness that 20 years before he had seen a genuine signature of such person, without any showing that the witness had formed an idea of the character of the genuine handwriting.

4. ———: ———. In the contest of a will on the ground of forgery, the opinion of a nonexpert witness on the genuineness of a disputed signature may be rejected, if based alone on a comparison of the disputed and genuine documents in evidence, the jury in that respect being as competent as the witness.

5. ———: EVIDENCE AT FORMER TRIAL: ADMISSIBILITY. "Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause between the same parties is admissible if otherwise unobjectionable." *Jerich v. Union P. R. Co.*, 97 Neb. 767.

6. ———: ———: ———. Where the circumstances justify the reading of the testimony of an absent witness, all of his testimony on a former trial may be read, if otherwise admissible, though his cross-examination might have been waived had he been present at the second trial.

7. WILLS: CONTEST: PROOF OF SIGNATURES: REBUTTAL EVIDENCE. In a proceeding to probate a will, contested on the ground of forgery, where the subscribing witnesses are dead, proof of the signatures of the subscribing witnesses and of testator is necessary, and proponent should introduce his evidence as to the genuineness of such signatures, and the trial court in its discretion may refuse to permit him, on rebuttal, to offer additional affirmative evidence on that issue.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

Duncan M. Vinsonhaler, for appellant.

F. P. Olmstead, James E. Addie and *McCreary & Danly, contra.*

Willis E. Reed, Attorney General, Dexter T. Barrett and *Sutton, McKenzie, Cox & Harris, amici curiæ.*

ROSE, J.

This is a proceeding commenced in the county court of Adams county May 12, 1914, to probate an instrument described as the last will of John O'Connor, who died in Hastings, August 17, 1913. John T. Culavin is proponent and in the document offered by him for probate he is named as sole beneficiary. Contestants claim to be heirs of O'Connor and assail the purported will as a forgery. The county court sustained the instrument as genuine, but on

appeal to the district court a jury rejected it. From a judgment on the verdict in favor of contestants, proponent has appealed.

The principal question for review is the sufficiency of the evidence to sustain the verdict, which contains in effect a finding that the instrument offered for probate is a forgery. Throughout the record the purported will is described as "Exhibit A." J. H. Culavin and J. K. Scott, who appear on the face of the disputed writing as subscribing witnesses, are dead. Their signatures were identified at the trial by witnesses who testified to having seen them write their names, but on the issue as to handwriting proponent's witnesses were contradicted by witnesses for contestants. Proponent testified in substance: Exhibit A was executed in the office of the Northwestern Hotel in Hawarden, Iowa, February 25, 1887. It was written by O'Connor himself, who used a modified copy prepared by proponent under O'Connor's direction, the modified copy having been prepared from a draft made the previous day by J. A. Ashley, a real estate agent, who was consulted by O'Connor. Exhibit A was delivered to proponent by O'Connor April 1, 1887, and was afterward kept in the former's possession. This is the testimony of proponent, and he explains the delay in offering the instrument for probate by saying that after O'Connor's death he could not find the will until April, 1914, but then found it folded in a paid-up insurance policy. There is testimony tending to corroborate proponent's story of the execution of the will and of his possession thereof during O'Connor's lifetime. Other testimony of proponent tended to prove that he was a nephew of O'Connor; that the latter moved to Hastings in 1876; that he died there August 17, 1913; and that he had visited Hawarden February 25, 1887. On behalf of contestants there is testimony tending to prove that the O'Connor who died in Hastings, August 17, 1913, was not in Hawarden February 25, 1887, and in other respects casting suspicion on testimony of proponent.

The sufficiency of the evidence to sustain the verdict, however, does not depend alone on proofs of the character

indicated. Other proofs in the form of documents and expert testimony are more satisfactory. The disputed writing was introduced in evidence and speaks for itself in comparison with checks and letters covering a period of years beginning prior to the date of the purported will. These checks and letters are conceded to be genuine. For purposes of comparison exhibit A, the disputed instrument offered for probate, exhibit DD, a genuine letter written by O'Connor to proponent ten months before the purported will is alleged to have been executed, and exhibit CC, a genuine letter written by O'Connor nine years after the alleged execution of the disputed instrument, are reproduced herein.

EXHIBIT A.

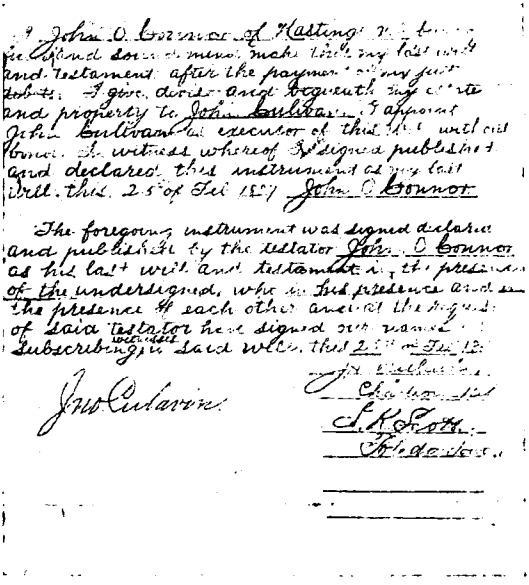


EXHIBIT DD.

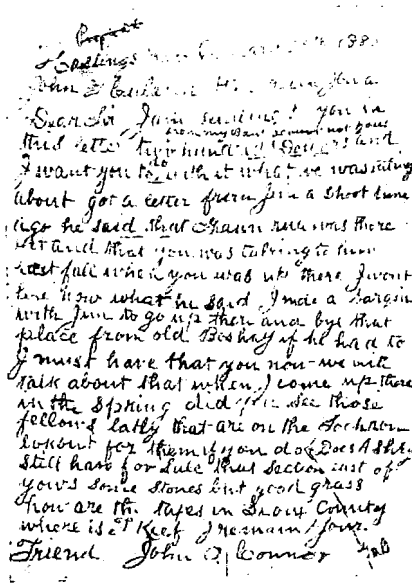
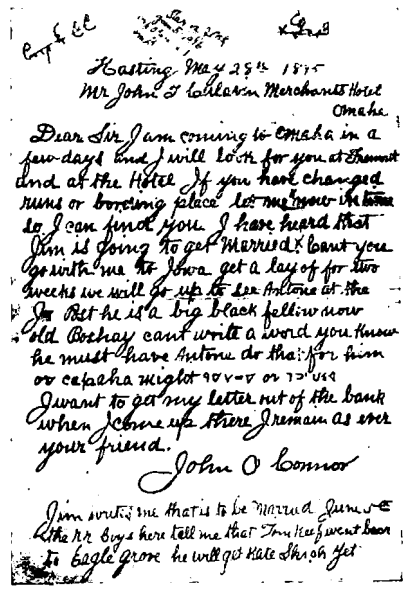


EXHIBIT CC.



Identifying characteristics and habits revealed by the letters reproduced are traceable in many other genuine documents introduced in evidence. Witnesses for contestants agree with proponent that whoever subscribed the name "John O'Connor" to Exhibit A, wrote the instrument itself, including the attestation clause. On the face of the disputed and the genuine writings, differences in the handwriting are obvious. Many of the earmarks which characterize O'Connor's handwriting as disclosed by the genuine documents cannot be found in the alleged will. The genuine writings disclose a uniformity of style at variance with the instrument offered for probate. If O'Connor wrote that instrument, in penning it he overcame habits which previously and subsequently controlled him in writing checks and letters, and he also concealed earmarks which are obvious in his other writings. Habits formed by O'Connor in using a pen or pencil are revealed in all of the genuine instruments, but they do not appear to have influenced the writer of the disputed will.

Two expert witnesses called by contestants expressed the opinion that O'Connor did not write the disputed instrument, and they gave reasons for their conclusion. Some of the reasons for the opinion that the offered will is a forgery follow: In handwriting there is a difference in the general appearance of the disputed and the genuine writings. There is also a variance in the slant of the letters and in the spacing. In the capital letter "I" the lower loop is below the base line in the genuine and above it in the disputed writings. In the genuine, the small letter "a," when not the first letter in a word, is not joined to the preceding letter, while it is otherwise in the disputed writing. In the genuine, the cross-mark of the "t" generally appears to the right of the stem, while it generally crosses the stem in the purported will. The two parts of the letter "k" are generally separated in the genuine documents and connected in the disputed will. In the genuine, the apostrophe in the name "O'Connor" is generally made with an upward movement, and with a downward movement in the disputed will. The difference in the letter "x" is marked. There are also other indications of forgery.

The qualifications of the expert witnesses called by contestants are challenged, but they both show candor and scientific knowledge. The experts did not confine themselves to mere opinion, but supported their conclusion by reasons which appeal to the judgment. Such testimony on the subject of handwriting, when considered with genuine and disputed writings, may amount almost to a demonstration. *Venuto v. Lizzo,* 132 N. Y. Supp. 1066. The testimony in the present case recalls the following observations:

"Handwriting is an art, concerning which correctness of opinion is susceptible of demonstration, and I am fully convinced that the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness. That demonstration will naturally consist in the indication of similar characteristics, or lack of similar characteristics, between the disputed writing and the standards, and the value of the expert's conclusion will largely depend upon the number of those characteristics which appear or are wanting. The appearance or lack of one characteristic may be accounted to coincidence or accident, but, as the number increases, the probability of coincidence or accident will disappear, until conviction will become irresistible." *Gordon's Case,* 50 N. J. Eq. 397, 422.

To refute the proofs and inferences of forgery, proponent points to the apparent age of the purported will—a fact conceded by a witness who testified as an expert on behalf of contestants. In this connection it is argued that there was no motive for forging a will February 25, 1887. The argument is not convincing. There is testimony tending to prove that O'Connor had recently abandoned a life of adventure among Indians; that as a cobbler he settled among strangers at Hastings and there led a quiet life for a quarter of a century; that at some time by some means he had accumulated considerable property. His life may have been in peril. With its secrets proponent was familiar. Under the circumstances the jury were not required to find that the apparent age of the document and the lack of motive disproved forgery.

In the argument counsel attached importance to the fact that "Culavin," the name of proponent, is misspelled in the alleged will. He argues that proponent would have spelled his own name correctly in forging a will for his own benefit. The argument is not conclusive. Open minds of jurors should reason from all of the sources of legitimate inference in connection with the misspelled name. Motives prompting a forgery may also suggest a means of avoiding suspicion. O'Connor knew how to spell proponent's name. He wrote it correctly in the genuine letter marked "Exhibit DD." This was ten months before the date of the purported will. He had not forgotten how to spell "Culavin" nine years later when the genuine letter marked "Exhibit CC" was written. According to proponent's testimony, O'Connor in drawing the will followed a copy prepared by proponent himself. In examining the will offered for probate, it will be observed that proponent's name is twice misspelled therein, but that halting and erasing attended its misspelling the second time. On an envelope postmarked two months after O'Connor's death, the name "Culavin" is written "Culivan," but in committing this error the writer evidently wrote the last syllable correctly and afterward changed the "i" to "a"—what seems to have been done in the writing of the purported will offered for probate. In an instrument dated August 1, 1913, and purporting to be O'Connor's will, "Culavin," beneficiary, is also misspelled. It is likewise misspelled in a letter of the same date, denounced by experts as a forgery, the letter containing the statement that O'Connor had made a will naming Culavin as beneficiary. The erasure in the misspelling of the name and the misspelling itself may have had a sinister import when considered by the jury. There is a reasonable aspect, therefore, in which the misspelling does not strengthen proponent's case.

The credibility of the witnesses whose testimony is conflicting in regard to the genuineness of the will offered for probate and the weight to be given to the testimony of those called as experts in handwriting were questions

for the jury. *Davis v. Lambert,* 69 Neb. 242; *Hayden v. Frederickson,* 59 Neb. 141.

The conclusion is that the evidence is sufficient to sustain the finding of the jury that the instrument offered for probate is not the last will of the John O'Connor who died in Hastings, August 17, 1913.

A ruling of the trial court in refusing to permit a witness for proponent to testify to the genuineness of the signature of Scott is challenged as erroneous. Though the witness testified to having seen the signature of Scott, the ruling assailed must be sustained for the following reasons: The witness had seen Scott's signature only twice, and this was 20 years or more before the trial. He did not testify that he had formed an idea of the character of Scott's handwriting. There was, therefore, no abuse of discretion on the part of the trial court—an essential element of error. 1 Wigmore, Evidence, sec. 694.

Another assignment of a similar nature is directed to the rejection of offered proof by another witness who was not permitted to testify to Scott's signature. This witness did not qualify as an expert in handwriting, but he was asked to express an opinion on the genuineness of Scott's signature, basing his answer on a comparison with two signatures which he had seen Scott write. These signatures were in evidence. In making the comparison the witness, not being an expert on handwriting, was no better qualified than the jury to express an opinion based on comparison of signatures. The law has been stated thus: "Where specimens are brought into court, there is no need of any opinion based on them except from persons skilled in handwriting; for the jury can judge as well as any other laymen." 3 Wigmore, Evidence, sec. 1997.

Another point argued is based on the reading of the testimony of a witness who, as an expert in handwriting, had testified in the county court. During the trial in the district court the expert was in Chicago, engaged in a hearing requiring his attendance for two weeks. In permitting the reading of this testimony under the circumstances, the trial court did not err. *Jerich v. Union P. R. Co.,* 97 Neb. 767; 2 Wigmore, Evidence, sec. 1404. It is

argued, however, that error was committed in allowing the cross-examination and the redirect examination of the expert to be read in evidence over the objection of proponent, since, had the witness been on the stand, cross-examination could have been waived. The argument is technical and the rule invoked by proponent might conceal facts essential to a just decision. The purpose of a trial is to discover the truth and administer justice. Where competent testimony on a former trial came legally from proper sources of information, it should not be rejected on a second trial of the same case merely because one party rather than the other made the inquiry which developed the truth. *Ulrich v. McConaughey,* 63 Neb. 10. The cross-examination to which objection is made consisted principally of questions and answers relating to the competency of the expert and to the reasons for his opinion that the will offered for probate was not genuine. Documents revealing the characteristics or habits from which the expert reasoned in his cross-examination were properly before the jury. Information of this nature might have been brought out on direct examination had the expert been available during the trial in the district court. The rule is: "On direct examination, the witness may, and, if required, must point out his grounds for belief in the identity of the handwriting, on the principle already considered (*ante,* sec. 655). Without such a re-enforcement of testimony the opinions of experts would usually involve little more than a counting of the numbers on either side." 3 Wigmore, Evidence, sec. 2014.

Complaint is also made of the refusal of the trial court to permit three witnesses, who had seen O'Connor write, to testify to the genuineness of his signature as it appears on the will offered for probate. These witnesses were called on rebuttal. In a proceeding to probate a will, contested on the ground of forgery, where the subscribing witnesses are dead, proof of the signatures of the subscribing witnesses and of testator is necessary, and proponent should introduce his evidence as to the genuineness of such signatures, and the trial court in its discretion

may refuse to permit him, on rebuttal, to offer additional affirmative evidence on that issue.

Error in the proceedings has not been shown. The judgment is therefore

AFFIRMED.

HAMER, J., concurring.

The verdict of the jury finds the alleged will to be a forgery. The name John O'Connor appears three times in the instrument. It is written in the body of the instrument, and then it is signed to it. And it is also shown in the attestation clause. An examination of the words "John O'Connor," shows that the same person who wrote the body of the will and the attestation clause also signed the will itself. On the left-hand side of the paper and below the attestation clause I find the words "Jno. Culavin." These words, "Jno. Culavin," are, as I understand it, admitted to be in the writing of John Culavin, whose name appears twice in the body of the will. The "Jno. Culavin" is apparently aimed to be in a different handwriting from the John Culavin contained in the body of the will. I can readily understand that if the John Culavin mentioned in the will wrote the will, and it was a forgery, how he might like to interject some evidence which would clearly corroborate his story that O'Connor himself wrote the will. A comparison of the "J" in the "Jno. Culavin" with the "J" in John Culavin in the body of the instrument, shows that the lower part of the "J" is much lighter and shorter than the same part of the letter in the John Culavin twice written in the body of the will. The upper part of the "J" is larger, perhaps almost twice the length of the upper part of the letter as it appears in the instrument, but there is a sort of similarity in the "J" wherever it is written. The pen comes up as it completes the lower part of the "J" and crosses over the stem of the letter and connects with the other letters to be written afterwards. The "Jno. Culavin" is written together and without taking the pen from the paper until it finishes the letter "l." In the name John Culavin as it appears in the body of the in-

strument, the word "John" is written, then the pen is removed from the paper and a capital C is written "C," but in the "Jno. Culavin" written below the attestation clause the "C" is of the same form as a little letter "c" in the alphabet, and is only very little enlarged. In the instrument the word "Culavin" is written without lifting the pen from the paper, but in the name "Jno. Culavin" written below the attestation clause, the pen is lifted from the paper at the termination of "l" and being in about the middle of the word "Culavin." The remainder of the word, consisting of "avin," is written together and without lifting the pen from the paper. In the word "Culavin," as it appears written three times, the "v" and the "a" or the "i" (as it is spelled van, and also vin) are joined together in much the same way. In the three times the words are written there is the same sort of slope between the "v" and the "i," or, as it is spelled in the body of the instrument, the "v" and the "a." Under the tail of the letter "n" as it is first written in the body of the instrument, there is a little dot. This same little dot is put under the tail of the letter "n" in the same way in each case. Most persons would put the period after the end of the letter, and not under it.

Another peculiarity is that the word "Culavin" is not spelled the same way each time. A man ought to know how to spell his own name. If the proponent wrote it, he probably did know. In the "Jno. Culavin" it is spelled "Cul*a*vin." Where it is first written in the body of the instrument it is written "Cul*i*van." Where it is written the second time in the body of the instrument it appears to have been written "Culavin," and then to have been written over the first writing so as to make it "van." Why he should have had so much trouble in writing the name the second time, if he did write it, does not very clearly appear, except that if the proponent himself wrote it, he was evidently trying to mislead somebody and to lead the reader who examined the will to form a conclusion favorable to the genuine character of the instrument. The effort

made, suggests that the writer knew or believed that some question might be raised as to the good faith of the execution of the instrument, and therefore in the body of the instrument he spelled the name "Culavin" first one way, and then another way, and then corrected it, and subsequently put the word "Culavin" where it could be seen by all who looked at the instrument, and shown to be unlike the word as it appeared to be twice written in the body of the reputed will. The several specimens of the name seem to represent different styles of acting, the latter of which is purposely made to be different from the other two.

The letter "n" is twice written in "Jno. Culavin." It is much the same both times as it appears in the body of the will and also in the attestation clause.

I submit what I have written here as worthy of possible consideration in addition to what seems to me to be a conclusive argument in the body of the majority opinion touching the spurious character of the alleged will. The finding of the jury that a forgery was offered for probate seems to be fully sustained by the great weight of evidence.

DEAN, J., dissenting.

The learned trial court denied the offer of proponent to submit to the jury the testimony of the county treasurer and of the deputy county treasurer of Adams county and the cashier of a Hastings bank to establish that the offered signature and handwriting of John O'Connor were genuine. These men were long time residents of the vicinity and acquaintances of the decedent. They were not permitted to testify solely because proponent did not call them as witnesses in chief, as shown in the main opinion. The ruling is without the doubtful merit of being even technically correct. To exclude material testimony on a point so vital for the reasons advanced for excluding it appears to be an abuse of judicial discretion. *Seebrock v. Fedawa,* 30 Neb. 424, 431; *Kerr v. Lunsford,* 31 W. Va. 659.

The expert testimony on handwriting is not satisfactory. The expert conclusion is based on a comparison of the will with letters and bank checks admittedly genuine.

When the testimony is analyzed, the comparison does not seem to be altogether fair upon examination of the exhibits used for comparison. Ordinarily a bank check is hastily drawn for a temporary purpose, perhaps while standing at a bank counter, and with an indifferent pen, or maybe a pencil. To some extent the same is true of a letter. But vastly different is the laborious penning of a will by the hand of a testator. For a man who had lived the life of John O'Connor up to the time the will was written, for one of his temperament and lineage, the making of a will would be a matter of great and dignified import, an event extraordinary, one that would attain almost to the solemnity of a religious rite. It would hardly be expected that he would write a bank check for a nominal or for any amount, or an ordinary letter, with the same care and precision that he would with his own hand write his will from a copy that was prepared by his direction and that lay before him as he wrote. As between an authentic will so written and a collection of bank checks and a few letters as those instruments are ordinarily written, one would expect to find a variance in the slant of some of the letters and in some of the spacing. One would expect to find the cross-mark of almost every "t" crossing the stem in any will that John O'Connor ever wrote, and the lower loop of the capital letter "I" would be planted squarely on the base line. The expert testimony seems to prove too much. In a forgery so much fault is not ordinarily found either with slant or spacing, nor as to the other discrepancies pointed out by the expert testimony.

It would be a different situation if the discrepancies were found in separate collections of checks, or of letters, one collection being admittedly genuine and the other in dispute, and each collection compared with the other. But that is not the case before us. The discrepancies are of the sort that one would expect to find in a comparison between a will that was carefully and solemnly prepared, written and signed by a testator, and checks and letters that were written by him to serve the passing purpose of

a day. Circumstance of time and place and purpose and condition all have to do with the appearance of the handwriting. For the reasons pointed out, and for others equally apparent from a careful reading of the main opinion, the writer submits that the probative value of the expert testimony on handwriting in the present case is reduced to the vanishing point.

It is a splendid sentiment to which the main opinion gives expression and to which all will agree, viz.: "The purpose of a trial is to discover the truth and administer justice." But it is a far cry from a purpose so laudable to the order of proof of the trial court that, for a trivial reason that was scarcely if at all even technically correct, excluded the offer of material testimony that was intended to aid the jury to discover the truth with respect to a vital point, namely: Did John O'Connor, the Hastings recluse, with his own hand, write and sign the will in question? Every case should be made to hinge, not upon technical rules invoked by the skilled tactician, but rather upon the eternal principles of truth and justice so aptly alluded to in the majority opinion.

HENRY M. THORNTON, APPELLANT, V. VERNON KINGREY ET AL., APPELLEES.

FILED OCTOBER 2, 1917. No. 18914.

Rehearing of case reported in 100 Neb. 525. *Former judgment adhered to.*

SEDGWICK, J.

More than ten years before this action was begun, a lateral was constructed from the irrigation ditch of the Gering irrigation district, about 2½ miles to the village of Gering, and thence through the principal streets of the village. A few years thereafter the plaintiff purchased a quarter section of land within the limits of the village.

When this lateral was constructed, the plaintiff's grantor, who was then the owner of this land, began irrigating the land from the lateral, and the plaintiff has continued so using the water until the village authorities undertook to prevent him from taking water from the lateral for that purpose. The plaintiff began this action in the district court for Scott's Bluff county to restrain the village authorities from interfering with his use of the water. No restraining order or alternative writ was granted, and upon the trial the court found the issues in favor of the defendants and dismissed the plaintiff's case. The plaintiff has appealed.

By our former decision (100 Neb. 525), the order of the district court was so changed "as to require the village, before ceasing to supply the plaintiff with water through the lateral in dispute, to take such steps as may be necessary so that the plaintiff may be able to receive upon his land as much water through another lateral as he formerly obtained from the lateral in dispute, and without additional expense for construction of the same." Upon the defendants' motion for rehearing, arguments were heard and the case was again submitted. Various questions are raised and discussed as to the jurisdiction and power of the village authorities in the premises. The statute provides that a village may enact ordinances, "to establish, alter and change the channel of watercourses, and to wall them and to cover them over; to establish, make and regulate wells, cisterns, windmills, aqueducts and reservoirs of water, and to provide for filling the same." Rev. St. 1913, sec. 5119. Furnishing water for the public purposes of the village and for the use of the inhabitants in arid and semi-arid districts is of so much importance that there can be no doubt of the authority of the village under this statute to provide and care for and control laterals for that purpose. It does not appear from the record what contracts, if any, the village authorities have with the irrigation district for the supply of the water, nor what formal proceedings, if any, were taken by

the village authorities in regard to the construction, management and control of the laterals in the village. The defendants have assumed control over the lateral, and are now exercising control of the same. They employed an agent, the defendant Barkdoll, to control the division of water therein to the different pieces of land under said lateral.

It was stipulated by the parties that the defendants employed the said Barkdoll to superintend the delivery of the water from the lateral, and paid him by warrant on the village treasurer. The evidence shows that the village owned a one-half interest in one of the laterals in the village by contract, and that the village constructed the lateral in question. There is no evidence of any ordinance of the village providing for supplying the inhabitants of the village with water in such manner, and there is no definite evidence as to when or in what manner the village undertook the construction or purchase or control of this plan or system for furnishing water. As the village has control and is managing it, we must assume that they have taken legal action and have protected the rights of the village and its inhabitants by suitable ordinances and contracts with the irrigation district. So that the question seems to be whether in the management of its system of water supply the village can be allowed under the law to discriminate in this manner between citizens. Before the commencement of this action an ordinance was adopted in which, after a preamble reciting some of the existing conditions, it was resolved: "That hereafter no water for the irrigation of farm lands shall be carried through any of the laterals in the village of Gering, except through said joint lateral owned by said Ray Carling and others and the village of Gering." The plaintiff alleged in his petition that the village was discriminating between him and the owners of other "farm lands" within the village, in that they allowed other lands to be irrigated from this lateral, but refused him the same privilege. The evidence will not justify the conclusion that

the village authorities were attempting such a discrimination, and this action must be regarded as an attempt to restrain the enforcement of the said ordinance.

It appears from the evidence that O street, through which this lateral runs from the point where it enters the village, descends rapidly at from 3 to 5 feet to the 100 feet, and that it has frequently happened that on account of this fall in the course of the lateral the water has escaped in large quantities and has overflowed parts of the village and has injured the foundations of some of the business buildings. An attempt has been made to remedy this by putting in what they call "drops" of 3 or 4 feet at various intervals, but these so far have not fully remedied the trouble. There is evidence, which does not seem to be contradicted, that a lateral 18 inches deep and 18 inches wide would carry the necessary volume of water without causing this overflow. There is no doubt that in the control and care of the streets the village authorities have a legal discretion to determine existing conditions, and the best method of serving all the interests of the public.

If the plan and system which has been adopted is found to be impracticable, the remedy must be with the village authorities. If it should be found necessary to transfer this lateral to another street of the village, no doubt it would be within the reasonable discretion of the authorities to do so. These lands which it is now attempted to deprive of water are within the village and have been improved and cultivated with reference to these water rights, which their owners have used for many years, and the evidence shows that to now deprive these parties of the use of this water would greatly damage them financially and probably in other ways. If the village continues to take this water supply from the irrigation district for the benefit of the inhabitants of the village, it must be for the benefit of all of the inhabitants alike and without discrimination.

We think, therefore, our former decision is right, and it is adhered to.

FORMER JUDGMENT ADHERED TO.

FARMERS STATE BANK, APPELLEE, V. HARRY BUTLER ET AL., APPELLANTS.

FILED OCTOBER 2, 1917. No. 19582.

1. **Contracts:** MARRIED WOMEN: FOREIGN CONTRACTS. Our statute, so far as it limits the right of a married woman to contract except in reference to her separate property, has no application to a note executed in and governed by the laws of another state, where she "may make any contract, which she could make if unmarried, and shall be bound thereby."

2. **Pleading:** ACTION ON NOTE. If the plaintiff, in addition to the necessary allegations in a petition upon a promissory note, alleges that he is an innocent purchaser thereof for a valuable consideration before maturity, such allegation does not constitute his cause of action. It is a plea in avoidance of anticipated defenses, and is usually reserved for the reply.

3. ———: ———. In such case, if the defendant answers special defenses against the note, the plaintiff in reply may allege facts in avoidance of such defenses.

4. **Evidence:** EXPERT EVIDENCE: QUESTIONS OF LAW. The question whether an offered title is marketable may be a question of mixed law and fact, but is generally a question of fact. When questions of law are involved, expert testimony is peculiarly applicable.

5. **Appeal:** LAW ACTION: FINDINGS BY COURT. When, in a jury trial, the trial court with the consent of all parties tries a particular question of fact involved, his finding thereon will be entitled to the same force as a finding of the jury, and will not be disturbed upon substantially conflicting evidence unless clearly wrong.

6. **Trial:** DIRECTION OF VERDICT. When there is no substantial conflict in the evidence upon matters to be submitted to the jury, so that a verdict for the defendant upon those matters could not be sustained, it is the duty of the court to instruct for the plaintiff upon those issues.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN, JUDGE. *Affirmed.*

Matt Miller, for appellants.

Hastings & Coufal and *Sasse & French, contra.*

SEDGWICK, J.

This action was brought in the district court for Butler county upon a promissory note executed by these defendants, in which the Morden Land & Loan Company of Minneapolis was named as payee. The plaintiff in the petition set out the promissory note, and alleged that the payee named therein indorsed, transferred and delivered the note to the Drake & Ballard Investment Company, and that that company thereafter indorsed and delivered the note to the plaintiff. The petition then alleged: "That the plaintiff so purchased said note, before maturity, in the usual course of trade, for a valuable consideration, in ignorance of facts, if any existed, which would affect its force as between the original parties to it, and is an innocent, *bona fide* purchaser thereof."

The defendant Viola Butler answered that she was a married woman, and that she did not receive any consideration for the note, and did not execute the same with reference to her separate estate. To this answer the plaintiff replied that the note was a Minnesota contract, and under the laws of Minnesota a married woman "may make any contract, which she could make if unmarried, and shall be bound thereby," except conveyances and contracts for the sale of real estate, which are specially provided for. This allegation does not seem to be seriously controverted, and this special defense under the laws of Minnesota does not seem to be available.

The defendant Harry Butler answered setting up a failure of consideration for the note and other substantive defenses, and to this answer the plaintiff replied repeating the allegation that it was an innocent purchaser of the note, and alleging other matters in the way of avoidance of the special defenses pleaded. The defendant then moved to strike out these allegations of the reply on the alleged ground that they were "departure from the original cause of action." The defendant states in the brief: "The cause of action alleged in the petition is that the plaintiff is the owner of the note in question, having purchased the same

before maturity for a valuable consideration, in the usual course of trade, in ignorance of facts, if any existed, that would affect its force between the original parties to it, and is an innocent, *bona fide* purchaser thereof, * * * and cannot recover, except as the owner of the note, an innocent purchaser thereof for a valuable consideration, and, if he fails in this, then he cannot recover upon any other grounds, nor upon any matters alleged in the reply."

We cannot agree with this proposition. The cause of action alleged in the petition was the promissory note, and when the defendant pleaded special facts that he claimed rendered the note invalid for any reason, the plaintiff might in reply avoid these facts. "The office of a reply is to deny the facts alleged in the answer as a defense, or to allege matters in avoidance of such defense not inconsistent with the cause of action set out in the petition." *Plummer, Perry & Co. v. Rohman*, 61 Neb. 61. The motion to strike these matters out of the reply and the demurrer to the reply upon these grounds were properly overruled.

The note was given as part of the purchase price of a farm in Dodge county, Minnesota. The contract between the parties, in pursuance of which the note was given, provided that the payee in the note should furnish an abstract showing a merchantable title in the land; and the defendant alleges, and there is evidence tending to prove, that the note was delivered to an officer of the payee company upon the express agreement that it should not become the property of the payee until an abstract was furnished showing a marketable title. The evidence shows without contradiction that the note was indorsed and delivered to this plaintiff, and that the plaintiff paid full consideration therefor, and is therefore the owner of the note. So that the defendant correctly says in the brief: "What is a marketable title? That is the only question for the court to answer; that is the only question that the court can answer." If the abstract showed a marketable title, then the delivery of the note was properly made, and the terms of the contract in that respect have been com-

plied with. The defendant quotes from 26 Cyc. 819, a definition of a marketable title, in which it is said that it is "a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept." The defendant's objections to the abstract are principally predicated upon questions of jurisdiction of the probate court to probate the will of one John W. Allen, through whose estate the title came, which was admitted to probate in 1874. Defendant says that the abstract "is silent as to all jurisdictional facts, no petition for the probate of the foreign will being attached to the abstract," and he then recites that it does not appear that the proceedings were in the proper county; it does not appear that it was offered for probate by the right person; it does not appear that the claims against the estate nor the legacies were paid; it does not appear that the executors of a subsequent estate through which the title passed "were qualified and acting at the time they purported to deed this property."

The case was tried to a jury, and the court instructed the jury to find a verdict for the plaintiff. The plaintiff requested at the trial that the question whether or not the title shown by the abstract was a marketable title should be tried by the court. The defendant conceded this, and the question was so tried and the court found that issue for the plaintiff. The question whether an offered title is marketable is sometimes difficult to determine. It may be a question of mixed law and fact, but is generally a question of fact.

The plaintiff produced several witnesses who testified fully and clearly that these matters and other similar matters suggested by the defendant did not discredit the title or render it unmarketable. Among these witnesses was a former chief justice of the supreme court of Minnesota, and other fully qualified witnesses. It may be said that there was some conflicting evidence. The defendant produced a

witness who testified as an expert that he did not consider the title marketable, but he failed to show any unusual familiarity with such matters; and at all events it must be found that the evidence was at least substantially conflicting in favor of the finding of the trial court, and, being an ordinary action at law, that finding must be upheld unless clearly wrong. We conclude that the finding that the offered title was marketable is sufficiently supported.

When there is no substantial conflict in the evidence upon matters to be submitted to the jury, so that a verdict for the defendant upon those matters could not be sustained, it is the duty of the court to instruct for the plaintiff upon those issues. This renders it unnecessary to inquire whether this plaintiff was an innocent purchaser of the note, as the defense relied upon failed even as against the original payee.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

OTTO F. WALTER, TRUSTEE, APPELLEE, V. NATIONAL FIRE INSURANCE COMPANY ET AL.: GRONEWEG & SCHOENTGEN COMPANY, APPELLANT.

FILED OCTOBER 2, 1917. No. 19607.

Bankruptcy: PREFERENCES: NOTICE. If a debtor who is insolvent pays or secures one of his creditors, such creditor is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's insolvency which were brought home to him, might fairly be expected to disclose. It is not necessary, under the bankrupt act, to find that the creditor actually knew or believed that the debtor was insolvent.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Lambert, Shotwell & Shotwell and *D. H. Sheehan,* for appellant.

Otto F. Walter, contra.

SEDGWICK, J.

Charles Caldwell was adjudged a bankrupt. Among others he was indebted to the defendant Groneweg & Schoentgen Company, and assigned to that company an interest in an insurance policy in settlement of the claim. Afterwards, in an action upon the insurance policy, the company admitted its liability, and the question presented to the court was as to the validity of the assignment to the Groneweg & Schoentgen Company. The trial court decided that Caldwell was insolvent at the time of the assignment, and that the assignment was an unlawful preference, and was therefore void. The defendant Groneweg & Schoentgen Company appealed.

The questions presented are essentially questions of fact. Was Caldwell insolvent at the time of the assignment to this defendant? Did this defendant have such notice of the insolvency as to render the assignment void under the bankruptcy act as an unlawful preference?

It is conceded that the assignment was made within the four months prior to the adjudication of insolvency, and the evidence that Caldwell was insolvent at the time of the assignment is so clear that it requires no discussion. Indeed, it is not much discussed in the defendant's brief. So that the controverted question in this case is as to the knowledge or notice that this defendant had of such insolvency at the time it took the assignment.

One Russell acted as the agent of this defendant in adjusting its claim and procuring the assignment from the defendant. He was a witness upon the trial and testified in behalf of the defendant. Russell knew that Caldwell had been conducting a bakery, and that his stock of goods was entirely destroyed by the fire, that his insurance on the stock and fixtures was $2,600, and that the fixtures not destroyed by fire were of considerable value, so that he knew that Caldwell could not recover the full amount of his insurance upon his policies. In his inquiries he learned that Caldwell had no real estate. He made inquiries

among the business men of the town as to Caldwell's financial condition, and was told that it was "only a question of whether he gets all of his insurance money," and, as Russell knew that he would not collect the total policy, this was notice that he would not be able to pay his liabilities. He testified that he interviewed the bank of the town, and said: "Well, they said if he gets his insurance he will pay out, but they didn't know whether he was going to get it all or not, but they didn't think he would get all of his insurance." This was a statement by the officers of the bank upon Russell's inquiry that in their opinion Caldwell would not be able to pay his liabilities.

"It is not necessary that the creditor knows or even actually believes that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that, when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence and an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and, if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained." 1 Loveland, Bankruptcy (4th ed.) sec. 508.

"In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624. *Farmers & Mechanics Bank v. Wilson*, 4 Neb. (Unof.) 606, is not inconsistent with this view.

The court tried this case without a jury, and the findings have the same weight as would the findings of a jury. It

seems clear that under this evidence this court cannot say that the findings of the trial court are so wholly unsupported as to require a reversal.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

C. G. BOWEN, APPELLANT, V. HOLT COUNTY ET AL., APPELLEES.

FILED OCTOBER 2, 1917. No. 20013.

1. **Taxation:** MORTGAGED PROPERTY. The total taxable value of any mortgaged tract of land cannot exceed the sum of the interest of the mortgagor and mortgagee. Rev. St. 1913, sec. 6351.

2. ———: INJUNCTION. If more than such value shall be made the basis of assessment and taxation, the collection of the tax upon such excess may be enjoined upon the application of the party injured.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Reversed.*

W. J. Hammond, for appellant.

Hugh J. Boyle and *J. A. Donohoe, contra.*

HAMER, J.

The plaintiff, C. G. Bowen, began this action to declare void parts of certain tax liens on land in Holt county. The case was determined on general demurrers to the petition. These demurrers were filed by Holt county, the county levying the taxes, and by the purchaser at tax sale, A. Baker. They were sustained.

The facts as they appear from the petition are that in August, 1911, a mortgage for $400 was given on the land, which was a first mortgage. Subsequently a second mortgage was given. This second mortgage was for $300, and it was afterwards acquired by the plaintiff. December 3,

1912, the then holder of the legal title to the land executed to one Mallory a mortgage on the land for $7,000. In 1912 the assessed value of the land was fixed at $380. In 1913, though no improvements had been placed on the land, the county clerk and county assessor caused the interest of the Mallory mortgage to be assessed against the land at $7,000, and caused taxes to be levied against the premises on the valuation for the purpose of taxation at one-fifth of the $300 mortgage, and one-fifth of the $7,000. These mortgages contained the provision that the mortgagor should pay taxes on the mortgages. The levy made on this valuation shows $87.60 taxes, whereas the levy on the value of land as fixed in 1912, and without reference to the $7,000 mortgage, shows only $16.56 as the tax to be collected. The defendant Baker purchased the land for delinquent taxes of 1912, and paid in 1914 the taxes assessed against the land in 1913, and he threatens to foreclose his lien and claim for the taxes paid.

The petition alleges that Mallory became the holder of the legal title, and in 1916 the plaintiff purchased the title from Mallory, paid off the first mortgage and released the second. It also alleges a tender of the amount legally due for taxes and costs of sale, a refusal by defendant to accept it, and payment of the amount into court, and an offer to pay any sum found by the court to be due. The prayer is that defendant Baker be required to accept the amount tendered in full of all claims against the real estate, and that Holt county be required to pay Baker any amount due him by reason of his payment of the taxes for 1913, and that Baker be enjoined from enforcing his claims. It is claimed on the part of the county that no cause of action is stated against it because the interest which it had in the taxes passed from its hands before the bringing of the action.

The real question in the controversy is between the plaintiff and Baker as to whether the value for the purpose of taxation in 1913 can be made on the basis of the mortgages against the land or must be determined by the

assessment of 1912 and without reference to the giving of the $7,000 mortgage. This question involves the consideration of sections 6349-6353, Rev. St. 1913, and especially of sections 6350, 6351. Section 6350 provides that a mortgage is an interest in real estate for the purpose of assessment and taxation. A part of section 6351 reads: "The county assessor in any county where the law provides that such officer shall compile the assessment book, and the county clerk in any county where the law provides that such officer shall compile the assessment books, shall each year prior to the first day of April examine the records of mortgages filed, and make a record in the assessment book against the land covered thereby, of any mortgages and the amount of such mortgage and the name of the mortgagee or assignee. The assessor shall at the time the property is assessed assess the mortgage interest and the value of the real property above the mortgage interest separately. The assessment as to the mortgage interest, and the value in excess thereof, shall be revised annually as the facts may require to affect an assessment of the real property in accordance with the provisions of this article; provided, the total assessed value of any real property, including the interests of the mortgagor and mortgagee, shall not be changed excepting when all the real property of the county is assessed, unless the value of the property is changed by reason of a change in the improvements thereon." These provisions must be read with the statutes providing for the assessment of real property generally, Rev. St. 1913, secs. 6420–6435, which provide for the assessment of real property quadrennially, beginning with the year 1904. We think the manifest purpose of sections 6350, 6351, above quoted, is to secure the assessment and taxation of the mortgagor's and mortgagee's interests separately. Each interest is an interest in the land. The sum of these interests is the value of the land itself. If the amount of the mortgage exceeds the value of the land, yet the value of the mortgage or any "interest in real estate" cannot exceed the value of the real estate in which it is an interest, and

ought not to be assessed at more than the value of the real estate. That this was the thought of the legislature is made entirely plain by the provision in section 6351: "The total assessed value of any real property, including the interests of the mortgagor and mortgagee, shall not be changed excepting when all the real property of the county is assessed, unless the value of the property is changed by reason of a change in the improvements thereon." By this proviso uniformity in the assessment of real property mortgaged is secured. It is manifest that the total assessed value of any real estate cannot exceed the interest of mortgagor and mortgagee. There was no authority under the facts pleaded to change the assessment, and so much of the tax as resulted from the levy upon such increased valuation is void.

The judgment of the district court as to the defendant Baker is reversed and the cause remanded for further proceedings. The action is dismissed as to Holt county because it is without interest in the case.

REVERSED.

SEDGWICK, J., not sitting.

CHARLES ZENG, APPELLEE, V. IDA JACOBS ET AL., APPELLANTS.

FILED OCTOBER 2, 1917. No. 19471.

1. **Homestead: OCCUPANCY: ABANDONMENT.** While the occupancy of premises (the separate property of the wife) as a home is evidence of its homestead character, it is not conclusive, and, where such occupancy was temporary in character and has been long abandoned, and the evidence shows that the wife has never consented to its selection as a family homestead, the husband acquires no homestead right in it.

2. **———: ABANDONMENT.** The temporary absence from the home for purposes of pleasure, health or business, intending to return to it when the reasons for removing no longer exist, does not amount to an abandonment of the homestead right therein.

3. ———: ———. But where, as in the instant case, the absence from the home (the wife's separate property) was for over 14 years, the family in the meantime occupying various other houses in the same town, and the husband for five years afterwards made no claim of homestead right to the occupant of the premises holding it under deed made by the wife before her death, and who was in the meantime putting valuable improvements upon it, no adequate reason being shown for such continued absence from the home and for failure to make claim of the homestead right, *held*, that such facts show an abandonment of the homestead by both husband and wife.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Reversed.*

F. D. Hunker and *A. M. Emley,* for appellants.

J. H. Lindale and *F. Dolezal, contra.*

CORNISH, J.

Action to establish right of homestead in lot 8, block 21, West Point, Nebraska, as the surviving husband of Caroline Zeng. The defendants, holders and occupants of the property under a deed from Caroline Zeng, deny that plaintiff ever acquired a homestead right in the property, and allege that if he did it was abandoned. The trial court found for plaintiff.

It appears that plaintiff and Caroline Zeng were married at West Point on September 19, 1891; that she was then the owner of the property, which has never exceeded in value the sum of $2,000; that on June 3, 1892, she conveyed the property to plaintiff for a consideration stated of $1,135, secured by mortgage; that on March 18, 1893, plaintiff reconveyed the property to her for a consideration stated of $1,135; that on July 25, 1893, she and plaintiff gave a deed of the property to John Forrer; that on February 6, 1894, the property was reconveyed to her; that on April 13, 1907, she conveyed the premises by warranty deed to Fred Budwig and others, her children. This deed was not signed or acknowledged by her husband. Afterwards her grantees conveyed to Fred Jacobs, husband of defendant Ida Jacobs. It further appears that the plain-

tiff and his wife lived on the premises for at least one year after they were married; plaintiff contending five or six years. It is probable that the occupation was for not more than two or three years at most. Afterwards, except during one year, when the husband was necessarily away from West Point, they occupied various houses in that town, finally a house known as the Hartwig house, until the fall of 1906, at which time plaintiff left his wife and lived at a separate place. She was then in her last sickness. On request of her daughter, then renting the property in controversy, she went to reside with her, where, soon after, she died. At the time of the marriage the wife had several children. None was born to this marriage. After the wife's death defendant Jacobs occupied the property as owner for over five years and put $700 or $800 of improvements upon it. No attempt was made upon the part of plaintiff to assert a homestead right or give Jacobs notice that he claimed such a right. The plaintiff's explanation of his failure to occupy the premises as a home from about 1893 to 1912 is that his wife's children were always making trouble; that he wished to get away from them; and that he and his wife left the premises, intending some day to go back. The explanation given by the other side is that plaintiff, when drinking and violent, would damage the property without paying the damages, and the wife wished to move for that and other reasons. The plaintiff's testimony would show that her children stayed at their home, without objection from him, about the same after moving as before. It appears that the plaintiff never at any time got along agreeably either with his wife or her children. Three times she began divorce suits against him; the last one pending at the time of her death. The evidence would indicate that after the reconveyance of the property to her by Forrer she never in any way consented to her husband's having a homestead right in the premises in dispute. She treated it exclusively as her own, collected the rents, and finally conveyed it by deed.

We are of opinion that the rule that the temporary quitting of the home for purposes of pleasure, health or business, intending to return to it, does not amount to an abandonment, will not apply in this case. The abandonment was more than temporary, and during the years that the wife and her children were away from the premises there was no intention of returning to it as their family home. The fact that upon her death plaintiff made no claim of homestead right at a time when defendant Jacobs was improving the property cannot be overcome by his evidence of his private intention to claim it, especially so in the absence of any adequate reason shown why there was no return to the home.

By section 3077, Rev. St. 1913, the husband's homestead right in the wife's separate property is made dependent upon her giving consent thereto. The evidence does not show that she ever gave such consent. The fact that they made this property their home for a time would be strong but not conclusive evidence of its homestead character during that period. We are of opinion that the evidence shows that the wife never did consent nor ever would have consented to the selection of this her separate property as a homestead, and in law it did not become such. *Klamp v. Klamp*, 58 Neb. 748.

The judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

WILLIAM A. FORD, APPELLANT, V. LOUISA E. FORD, APPELLEE.

FILED OCTOBER 2, 1917. No. 19609.

Divorce: ALIMONY: RECEIVERSHIP. Preliminary to making the order for the appointment of a receiver of the husband's property, provided for in section 1589, Rev. St. 1913, there must be an order, also provided for in said section, requiring the husband to give security for payments of alimony, according to the terms of the decree, and a failure or refusal upon his part to give such security.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

Arthur C. Pancoast and *A. J. Kinnersley,* for appellant.

D. L. Johnston and *George Turkington, contra.*

CORNISH, J.

In April, 1915, the defendant, Louisa E. Ford, obtained a decree of divorce *a mensa et thoro* from the plaintiff, and was awarded $30 a month alimony, together with the use and occupation of the home, which was a considerable portion of plaintiff's real property. Afterwards, on November 29 of that year, the plaintiff being in default of payment of alimony, defendant filed her petition in the original suit, making application for the appointment of a receiver for plaintiff's real and personal estate, in accordance with the provisions contained in sections 1589, 1590, Rev. St. 1913. A demurrer to the petition was overruled, and plaintiff in his answer alleged, among other things, that the defendant's action was prematurely brought, in that no order had been entered by the court, and no request made therefor, requiring plaintiff to furnish security for any payments due or to become due defendant under the terms of the original decree. The trial court ordered the appointment of a receiver to take charge of all of plaintiff's property, including real estate in another county.

It is one of the contentions of plaintiff that, in proceedings commenced under section 1589, Rev. St. 1913, preliminary to an order appointing a receiver, there must be an order requiring sufficient security to be given by the husband for the payment of alimony according to the terms of the decree. This was not done in this case. We are of opinion that the contention of plaintiff is right. It is argued that the plaintiff had refused to secure the payment of future instalments of alimony, and that, such being the case, the order that security be given would have been useless. Plaintiff, on the trial of the issues made in the application for a receiver, had a right to resist, for reasons that might appear good to him, either the order that se-

curity be given or that a receiver be appointed. It does not follow, because that was his attitude upon the trial, that he would not give the security if the court ordered it. The presumption is that he would. The order requiring security to be given and the one appointing a receiver are both somewhat extraordinary and drastic remedies. Such orders cannot be made except in strict compliance with the statute. *Nygren v. Nygren,* 42 Neb. 408. The order requiring security should be made only as it appears to the court that such an order is necessary to make sure the payment of the alimony decreed. If such an order is made and not complied with, then the court, in appointing a receiver, should put into the hands of the receiver only so much of the husband's property as appears necessary to be held to make sure the payments due and to become due.

Under the statutes, a decree for the payment of alimony is in the nature of a general judgment. What the rights of the wife as judgment creditor may be for the appointment of a receiver, in case the husband is fraudulently disposing of his property for the purpose of avoiding payment of the judgment, is not involved in this case, this being a proceeding brought under sections 1589, 1590, Rev. St. 1913. *Fall v. Fall,* 75 Neb. 120, 139.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MACARIO PERES ROMERO V. STATE OF NEBRASKA.

FILED OCTOBER 2, 1917. No. 20169.

1. **Homicide:** COMMON DESIGN. When two or more, in furtherance of a common design, enter upon the perpetration of a burglary, armed and prepared to kill if opposed, and while so engaged are discovered, and in the effort to escape one of the burglars shoots and kills one who is trying to arrest him, all are equally guilty of the homicide, although one of them, who was not armed with a deadly weapon, escaped before the shooting, and such killing was not part of the prearranged plan.

2. Instruction set out in the opinion, while not approved of, *held* not to have been prejudicially erroneous.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Richard S. Horton, for plaintiff in error.

Willis E. Reed, Attorney General, and *John L. Cutright, contra.*

CORNISH, J.

At 2 o'clock in the morning of January 21, 1917, Cornelius E. Cross, watchman of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, was shot and killed when he was attempting to arrest three men whom he then discovered in the act of robbing a car which they had broken and entered. The defendant (plaintiff in error) was one of the three men. In his brief it is stated: "The theory of the defense, supported by evidence, was that defendant was present unwillingly; that he had no gun; that he was anxious to go home; and that he ran away as long as five minutes before Cross was shot." It is uncertain who fired the fatal shot. The burglars had at least one gun, and defendant knew it. In defendant's confession, admitted in evidence over his objection, he stated that he fired the shot; but, according to his testimony on the witness-stand, he was coerced to join in the burglary by one of his companions, and ran away before the homicide. It is argued that if he was guilty at all it was as a coconspirator, and that whether the act of Lopez, who, defendant says, did fire the shot, was within their common purpose when the three went to the railroad yards, was a question for the jury, which, it is contended, the court, by refusing to give instruction No. 2 requested by defendant, excluded from the jury. Instruction No. 2 is as follows:

"You are instructed that even if you find that the defendant Macario Peres Romero and the other parties named in the information (naming them), on the occasion of the homicide, entered upon the premises with the common purpose of burglary, and the violence of the prisoner's com-

panion was merely the result of the situation in which he found himself, and that he proceeded from the impulse of the moment without any concert, then the prisoner would be entitled to an acquittal and discharge."

It will be noted that the instruction requested hardly bears upon the defendant's theory of the defense. It assumes a common purpose of burglary, and merely raises the question whether there must be concerted action in the shooting.

If one participating in a burglary would shoot and kill an enemy, whom he saw across the street, out of malice, and not in furtherance of the common design, then one would say his companions would not share the guilt of the killing; but if, on the other hand, the one killed was an officer attempting to arrest the lawbreakers, then one would say that his companions would share the responsibility and guilt of the killing, even though the killing had not been planned or expected by them. Both in morals and in law, if a man means one wrong and does another, he is punishable. This is true as to the individual, even though the killing may be unintentional or even accidental. Where one shares with others in the burglarious intent and act, and killing results from it as one of its natural, ordinary and probable consequences, he will not be heard to say that he did not intend or share in it. In the instant case, the plaintiff by his own testimony knew that his companion had a gun. He was bound to know that his companion might use it in resistance of an officer who might attempt to arrest him. The attempt to arrest is an interference with their plans. It is common experience that persons engaged in committing a felony may kill those who interfere. Such appears to be the general, though possibly not the universal, holding of the courts. *Conrad v. State,* 75 Ohio St. 52; *People v. Vasquez,* 49 Cal. 560; *Moody v. State,* 6 Cold. (Tenn.) 299; *McMahon v. People,* 189 Ill. 222; *State v. Nash & Redout,* 7 Ia. 347; *Miller v. State,* 25 Wis. 384; *Commonwealth v. Major,* 198 Pa. St. 290.

The instruction requested is bad for another reason. It has the court assume that Cross was killed as the result of

the violence of the defendant's companion. The jury might very well from the evidence have found that it was the defendant who did the killing.

The court's instruction No. 13, the last sentence of which is complained of as prejudicial error, is as follows: "You are instructed that under the law of this state, in weighing the testimony of police officers and detectives, greater care should be used because of the natural and unavoidable tendency of such persons to procure and remember with partiality such testimony as would be against the defendant. This instruction is not intended to either impeach or discredit the testimony of police officers either severally or collectively, but only as a reasonable caution for you to have in mind."

It is said: "Why should police officers be singled out and made the subject of an instruction if not to cast some discredit upon their testimony?" While we hardly approve of the last sentence of the instruction, yet we are of opinion that the purpose of such instruction is not to either impeach or discredit any particular testimony. It is a cautionary instruction to the jury, advising them of the care they should use in considering the particular testimony. The fact that a witness is interested in the event of the lawsuit calls on us to exercise extra caution in considering his testimony, but can hardly be said to impeach or discredit it.

The judgment of the district court is

AFFIRMED.

HAMER, J., concurring in the conclusion, but criticizing certain of the instructions used by the district court.

I concur in the conclusion reached by the majority opinion, but I am not fully in accord with all that is said, and I think that the district court was unfortunate as to certain of the instructions given. I deem it my duty to protest against some of the views expressed in the instructions, and I realize that such instructions may properly be criticized, although perhaps not sufficiently prejudicial to the plaintiff in error in this case to warrant a reversal of the judg-

ment. No law-abiding citizen sympathizes much with a burglar who goes out with a clearly defined purpose to break in and steal other peoples property, although the same is being carried in cars, and who gets into a bad predicament because of his wicked and lawless purposes, and the conduct of his vicious and lawless associates. Nevertheless it is the duty of each of the members of this court to examine the record carefully and to ascertain, if possible, whether the defendant had a fair trial in the district court, and, if he did not, then there should be a new trial, unless the errors complained of were without prejudice to the defendant. The defendant claims that he was acting under duress. He says that he was compelled to do that which he did. The defendant by his counsel, the public defender, requested the giving of the following instruction: "If you find that the part taken by the defendant in the commission of the crime was under duress and was not voluntary, then there would be no such intent as the law requires to constitute the crime charged."

The defendant received all he asked as to the giving of this instruction, and it may not have been necessary to refer to it in the majority opinion as the most such reference might accomplish would be in the direction of showing that the district court tried to be fair. It is claimed by the defendant that the trial court refused to submit to the jury the defendant's theory of the case. The giving of this instruction shows that he did submit that part of the defendant's theory relating to the alleged duress, but I am not fully satisfied that he submitted the other parts belonging to such theory as they ought to have been submitted, and yet perhaps there was no error.

As I understand counsel for the defendant, the defendant, with two others, succeeded in breaking into a box car standing in the yards of the Chicago, St. Paul, Minneapolis & Omaha Railway Company at Omaha, Nebraska, and they took merchandise out of the car. They were discovered, and the man who was killed knocked one of the two men down with his revolver. The defendant made his escape

and ran away. A few minutes after he ran away, the watchman was shot and killed by one of the burglars, who appears to have been in the car. The difficult part of the case is touching the question concerning whether a man should be held liable for an offense which he never intended to commit and in which he did not participate. Where burglars contemplate breaking into a dwelling house, and do so, and are attempting to remove goods in the house, and meet with resistance, and one of their number kills an occupant of the house, all are guilty if a killing occurs, and without reference to which one did the shooting. It must be held that if they went to commit a felony that they must have contemplated that there would be resistance when those living in the house were disturbed, and that it was contemplated that they would defend themselves, and that one or more might shoot if he deemed it necessary. The same principle should apply to the breaking into a car containing goods being transported for the benefit of the owner. But if the men who undertake to break into a car and to steal from it had no reason to suppose that it was guarded, and had no knowledge or reason to expect that the possession of the goods would be defended, then a different question is presented. Those who go to a dwelling house have reason to suppose that it is occupied by persons, unless they know to the contrary, and it will be presumed that they intended to do what they did; but when a thief goes to a box car standing on a railroad track, can it be presumed that he ought to know that the car was guarded and that the watchman or watchmen guarding the car would be likely to interfere with him? The point in favor of the defendant is that he might have gone to break into a box car and steal from it without the expectation of meeting any one, and without intending to shoot anyone, and without contemplating that his associates or either of them would shoot any one. In such case he might say that there was no objection on his part to breaking into the car and taking the merchandise out of it, but at the same time he did not want to shoot any one. It is a serious thing to be tried for murder in the first

degree and found guilty and sentenced to the penitentiary for life.

As I understand certain of the instructions given by the court to the jury, the jury were told, in effect, that if the defendant participated in the burglary it was immaterial whether he was present at the time of the shooting, and, although he had gone away and may never have contemplated the shooting, he would be guilty anyway if he had participated in the burglary.

The fourth instruction given by the court upon its own motion reads: "You are instructed that the statute of the state of Nebraska, defining the crime of murder, in so far as the same is charged against this defendant, provides as follows: 'Whoever shall * * * in the perpetration of or attempt to perpetrate * * * any burglary * * * kill another, * * * every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury.' In this connection you are instructed that it makes no difference at what stage of the attempted burglary, if you find from the evidence, beyond a reasonable doubt, one was attempted, the shooting took place, as long as such design and attempted burglary had progressed to some extent, in the manner and form charged."

The first part of the instruction confines the killing to the fact that it is in the perpetration or attempt to perpetrate the burglary. Now, can it be said that it is in the perpetration or attempt to perpetrate the burglary, when it is after the breaking and after the defendant has run away that the shooting occurs by another one of the burglars? It is easy to understand that the minds of the burglars met when they concluded to perpetrate the burglary, but one of them has run away and has been gone perhaps several minutes, and a new condition presents itself to the burglar who remains and who shoots; how can the other burglar know anything about it? Is this not punishing the man who has run away for the evil design and murder-

ous intent of the man who remained and who, whether justifiable or not, was confronted with a condition that had not existed up to the time that the man ran away? Conditions were apparently threatening for the man who remained. The man who was killed had knocked down one burglar, and he appears to have been lying quiet and the other burglar, who was in the car, might readily conclude that there were hostilities so far as he was concerned. Then he shoots. His case is not before us. We are not called upon to say whether his shooting was justifiable or not. But the condition that presented itself to him never presented itself to this defendant, because he had run away and was not in the immediate neighborhood. When the court said in the above instruction that "it makes no difference at what stage of the attempted burglary the shooting took place," as long as such burglary had progressed to some extent, he was telling the jury that, although the defendant had run away and was not there, yet if the car had been opened and there had been an attempt to rob it then he is to be found guilty of the shooting, although he may never have contemplated it.

The men who are willing to acquire property unlawfully, even to the extent of stealing it, are many perhaps, while only a comparative few would be willing to commit murder for the purpose of adding to their possessions. The purpose of the trial judge, as it appears in the above instruction, is further corroborated by the seventh and ninth instructions given by the court on its own motion. In the seventh instruction the court said: "The state is neither required to charge in the information, nor to prove at the trial, that the act of killing alleged was done purposely or of deliberate and premeditated malice." This was repeating in a way all that had been said in the former instruction, and it was telling the jury that, however sudden and unpremeditated the shooting had been by the man who remained behind, yet the defendant was liable for all of it. It is still further emphasized by the statement of the court in the eighth instruction "that where two or

more persons associate themselves together with intent to commit a burglary * * * all such persons are equally guilty, though one or more of them had not previously consented to the killing, and took no active part in actually producing the death."

That the purpose was to tell the jury that the defendant was equally guilty, whether he contemplated the killing or not, and whether he was there or not, is shown by the refusal of the court to give the second instruction requested by the defendant. The request was, in substance, that if the defendant's companions and the defendant entered upon the premises "with the common purpose of burglary, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and that he proceeded from the impulse of the moment without any concert," then the prisoner should be acquitted. Perhaps all the foregoing was not prejudicial, if the record contained evidence of a character tending to show that the defendant actually was on the ground, and that he participated in the conflict. I am not at all certain that the record discloses that fact; it is probably very doubtful; but the trial court and the jury were there, and they had the opportunity to hear the testimony and to determine its credibility.

Where the unlawful act agreed to be done is not of a dangerous or homicidal character and its accomplishment does not necessarily or probably require the use of force or violence which may result in the taking of life unlawfully, no such criminal liability will attach merely from the fact of having been a party to such an agreement. 1 Bishop, Criminal Law (7th ed.) sec. 641; 2 Hawkins P. C. (Eng.) ch. 29, secs. 19-21; *Regina v. Franz,* 2 F. & F. (Eng.) 580; Roscoe, Criminal Evidence (13th ed.) 673-675; *Lamb v. People,* 96 Ill. 73; *People v. Knapp,* 26 Mich. 112; *McLeroy v. State,* 120 Ala. 274.

But there is still a further instruction which deserves to be considered. Upon its own motion the court gave the following: "You are instructed that under the law of this

state, in weighing the testimony of police officers and detectives, greater care should be used because of the natural and unavoidable tendency of such persons to procure and remember with partiality such testimony as would be against the defendant. This instruction is not intended to either impeach or discredit the testimony of police officers, either severally or collectively, but only as a reasonable caution for you to have in mind."

There is some objection to the first sentence of the instruction; but, after having given it, it might be argued with considerable effect, and I doubt if any one may show to the contrary, that the purpose was to say to the jury that, although these men by reason of their occupation have an unavoidable tendency to procure and remember with partiality such testimony as is against the defendant, yet you will believe all that they have said anyway. *Preuit v. People,* 5 Neb. 377; *Kastner v. State,* 58 Neb. 767; *Sandage v. State,* 61 Neb. 240. To use an English expression, the district judge came very near "misdirecting himself." It is always a dangerous thing to suggest to a jury how it may avoid an established principle and go around it. The most skilful use of language is hardly adequate to the task.

The language used in *Preuit v. People,* 5 Neb. 377, is not the same as that used in this case and is much more vigorous. It gives the true reason for the greater care to "be used by the jury in relation to the testimony of persons who are interested in, or employed to find, evidence against the accused * * * because of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged." In the instant case it is said in the instruction that greater care should be used in weighing the testimony of police officers and detectives than other witnesses, but in the *Preuit* case one reason is given, and in the case at bar another reason is given. In the *Preuit*

case it is bias of the mind to construe everything as evidence against the accused and to disregard everything which does not tend to support their preconceived opinions. In that case the jury are told that police officers are partisans and against the accused because of their bias and interest in the case, and so there should be caution in weighing their testimony. But in the instant case the instruction given says nothing about bias of the mind to construe anything as evidence against the accused. The only thing charged is remembrance with partiality of such testimony as might be against the defendant. In the second sentence, even the very tame statement that the testimony of police officers should be weighed with care is modified by the second sentence which, however well intended, is likely to take away from the jury any caution with respect to such testimony. Notwithstanding all that I have said, I am not quite clear that the instructions given were so prejudicial as to demand and require a reversal of the judgment.

LIZETTA K. TANNER, APPELLEE, V. F. L. FRINK ET AL., APPELLANTS.

FILED OCTOBER 2, 1917. No. 19608.

Fraudulent Conveyances: CONVEYANCES BETWEEN RELATIVES. A transaction involving a conveyance of land between near relatives will, in a proper case, be closely scrutinized to discover if such conveyance was made fraudulently, or for the purpose of hindering, delaying or defrauding creditors or those to whom the vendor may subsequently become indebted.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

M. D. Tyler and *M. B. Foster,* for appellants.

H. C. Vail and *H. Halderson, contra.*

DEAN, J.

On June 11, 1914, Lizetta K. Tanner, plaintiff and appellee, commenced this action in the district court for Madison county to subject 320 acres of land in that county to the payment of a judgment for $9,312.15 that she recovered in 1913 against Dr. F. L. Frink, alleging ownership of the land in him. Ida V. Frink, who maintains that she is the owner of the land in question, is the wife of F. L. Frink, and she is therefore made a party defendant with her husband. Plaintiff obtained a judgment subjecting the land to the payment of her debt, and the defendants appealed.

On October 1, 1910, Dr. F. L. Frink bought a tract of Texas land from Ben I. Tanner, to whom he gave certain promissory notes aggregating $7,253.55 as part payment. On December 16, 1913, Lizetta K. Tanner, plaintiff and appellee, who became the owner of the notes given for the Texas land, brought suit thereon and recovered the judgment on which this suit is based.

Appellants in their brief, argue that "two questions are presented by the record: (1) Was the conveyance to Ida V. Frink fraudulent and void as to the subsequent creditors of F. L. Frink? (2) Was said conveyance made in trust for F. L. Frink?"

Plaintiff in her brief concedes that not only are the foregoing issues involved, but also one other, namely: "That F. L. Frink was engaged in a hazardous business and was a land speculator, and that he contemplated incurring debts and liabilities by reason of being engaged in such business."

F. L. Frink became the owner of the land that is involved in this action in December, 1899. On January 4, 1904, he and his wife conveyed it to F. A. Long, who in turn on December 8, 1906, with his wife, conveyed the tract to P. E. McKillip, and on July 6, 1907, P. E. McKillip and his wife executed and delivered a deed of conveyance to Ida V. Frink, in pursuance of her purchase of the land from her husband. Aside from the deed of conveyance

there was no written contract between the Frinks, nor were any notes executed evidencing the debt of Mrs. Frink to her husband. Defendants concede that F. L. Frink was the owner of the land during all of the time that the record title stood in the names of F. A. Long and P. E. McKillip, respectively. It is contended by plaintiff that the Long and McKillip conveyances were made for the purpose of hindering and delaying creditors of F. L. Frink, who was defendant in three suits in district court that were pending against him in 1904, 1906, and 1907, respectively, and wherein it was sought to obtain judgments against him for considerable sums of money. All of the suits were dismissed by the respective plaintiffs, one on May 14, 1904, one on December 11, 1906, and one on January 8, 1907. One of the dismissals was without prejudice, as shown by plaintiff, and the last dismissal was filed about six months before the execution of the deed to Mrs. Frink. It was while these suits or some of them were pending that the transfers of the land were made to Long and McKillip, and without consideration, as Dr. Frink frankly testified, but on advice of counsel.

Defendants testified that the agreement of Mrs. Frink to purchase the land in controversy from her husband was made and the deed executed and delivered in July, 1907, in consideration of the sum of $10,000 that Mrs. Frink agreed to pay to her husband out of anticipated proceeds of the estate of her father, who was then living, but who was then insane and under guardianship. He died on October 20, 1908. In this agreement and by the terms of the deed of conveyance she also assumed and agreed to pay a $5,000 mortgage lien then existing against the land as a part of the purchase price. It was in pursuance of this agreement and purchase that the McKillip deed to Mrs. Frink was executed. On December 23, 1908, it is shown that she paid to her husband $6,937.50 as part payment for the land, and that on January 5, 1910, she paid to him $2,084.66, both payments on the land, being all of the money that she received from the estate of her deceased father.

There then remained unpaid about $1,000 of the agreed purchase price, which was afterwards paid to her husband out of rentals derived from the land. It is clear that the amount of the mortgage that Mrs. Frink assumed and the money that she paid to her husband in consideration of the deed of conveyance fairly represented the value of the land at the time it was purchased by her.

Bank records, bank books, deposit slips, and the testimony of bank officers corroborated the testimony of the defendants with respect to the payments that she made to her husband for the land and that was deposited by him in the regular course of business. The deed of conveyance and its delivery to Mrs. Frink and its record by her direction appear to be regular in all respects. On the date of the conveyance of the land to Mrs. Frink, and at the time of the payments made by her to her husband, and at the time of his purchase of the Texas land from Ben I. Tanner, Dr. Frink was not indebted to any person except perhaps in a few trifling amounts pertaining to his household expenses in his home town. Aside from his indebtedness to the Tanners, which was incurred more than two years after Mrs. Frink bought the land from her husband, the record does not disclose that F. L. Frink was indebted to any person. Both of the defendants testified, and there is no proof to the contrary, that they never knew nor heard of the Tanners until a few days before December 23, 1908, when the Texas land was bought. Dr. Frink testified that he did not contemplate the purchase of any property when Mrs. Frink bought the land from him. In any event the record clearly discloses that neither of the defendants at the time of the conveyance to Mrs. Frink contemplated becoming indebted to Ben I. Tanner or to the plaintiff, nor does it appear that the Texas land was sold to Dr. Frink by the Tanners in the belief that he was the owner of the land in controversy and that was held in possession by Mrs. Frink at the time by the occupancy of her tenant.

Plaintiff argues, as a circumstance showing bad faith on the part of defendants, that for a part of the time after the

conveyance of the land to his wife, F. L. Frink took a lease from one of the tenants in his own name and collected the rent. This is explained in part by testimony showing that Mrs. Frink was not present when the lease was drawn, and besides she testified that her husband acted as her agent to collect rents and to make repairs and the like. It also appears that it was agreed between the defendants that the final payment of $1,000 on the purchase price of the land should be collected by F. L. Frink from the land rentals after the interest on the farm loan, the taxes and repairs were all paid. So that from any view point this feature of the case is not important. Bank books were produced and other testimony offered to show that for many years after Mrs. Frink acquired title to the land the rentals were deposited in the bank to her credit and used as her own individual funds. It is also shown that at times the Frinks had a common bank account against which they both checked as occasion required.

Testimony was offered by plaintiff to show that Dr. Frink purchased an 80-acre tract of land that he caused to be conveyed to his daughter Amy, in March, 1909, without any money consideration, and that in 1912 he purchased an automobile which he presented to his wife. But neither the tract of land so conveyed nor the automobile are involved in the present case which has to do solely with an effort to subject a certain 320-acre tract of land to the payment of plaintiff's judgment. Other transactions of a like nature are set out in the record, but they do not seem to be in any way involved in the transaction between the parties to this suit.

The rule of law is that a transfer of property between members of the same family will be closely scrutinized in a proper case, for the purpose of discovering whether such transfer was made for the purpose of hindering, delaying or defrauding present or future creditors. *Lininger v. Herron,* 18 Neb. 450; *Farrington v. Stone,* 35 Neb. 456; *Dunn v. Bozarth,* 59 Neb. 244; *Jayne v. Hymer,* 66 Neb. 785; *Lavigne v. Tobin,* 52 Neb. 686; *Ayers v. Wolcott,* 66

Neb. 712. In the present case we are unable to find evidence of bad faith on the part of the defendants. Mrs. Frink in the purchase of the land in controversy, besides assuming the payment of a $5,000 mortgage thereon, parted with a little more than $9,000, her entire patrimony, and approximately $1,000 derived from the rentals of the land, all in payment of the purchase price. At the time of the purchase by her and at the time of the payment of practically all of the purchase money, the outstanding obligations of her husband were negligible in amount. The record fails to show that the conveyance to Mrs. Frink was fraudulent or that it was made for the purpose of defrauding future creditors of F. L. Frink. And even if the conveyance was made by F. L. Frink with a fraudulent intent on his part, Mrs. Frink, under the circumstances of this case, would not be chargeable with the fraud of her husband unless she had guilty knowledge of the intended fraud. No such proof appears in the record, nor do facts appear from which it could be inferred.

It may be noted that the original contract for the purchase of the Texas land from the Ben I. Tanner Land Company was made by Dr. Frink in the name of Mrs. Frink as purchaser on December 23, 1908. On October 1, 1910, Ben I. Tanner and Dr. F. L. Frink entered into a contract for the same tract of Texas land, wherein Dr. Frink appears as sole purchaser and obligated himself to pay the debt on which this action is founded. On the same date and appended to the F. L. Frink contract is an agreement by Ida V. Frink releasing "the Ben I. Tanner Land Company, Ben I. Tanner, or A. G. Bauder, collectively or individually, for any damage by reason of the existence of such contract (Mrs. Frink's contract of December 23, 1908) and by reason of the further fact that said parties will agree to sell said land to said F. L. Frink." Both of the contracts were offered in evidence by plaintiff, and it is not shown that Mrs. Frink, or any other person with her knowledge, in any fraudulent manner or by the use of deception procured her release from the contract of December 23, 1908. From the recital with respect to

her agreement to save the Tanner people harmless from damage by reason of the change in the identity of the purchaser, it would seem that the thought of procuring her release and substituting F. L. Frink as purchaser perhaps originated in the mind of the Tanner company or its agents. About two months after Dr. Frink assumed the Texas land obligation, namely, on December 9, 1910, he paid $2,100 or more to the vendor to apply on the agreed purchase price. From this it would appear, as argued by the defendants, that if he ever formed an intention to defraud the Tanners, such intention must have been formed after the payment of $2,100 was made.

Defendants argue that the Tanners relied for their security for the unpaid remainder of the purchase price of the Texas land on the vendor's lien that they retained thereon, leaving it to be inferred perhaps that an afterthought prompted the attempt to subject the land in suit to the payment of the debt that plaintiff held against F. L. Frink. The record discloses that the land in question was purchased by Mrs. Frink for an adequate consideration paid by her. The transaction on her part was apparently made in entire good faith. She is not shown to be a holder of the land in trust for her husband, nor is it shown to be liable for the debt sued on. Mrs. Frink does not appear to have had knowledge, actual or constructive, of fraudulent intent on the part of her husband to defraud future creditors, even though such intent may have existed. Aside from a fairly lucrative practice as a physician and his interest in the Texas land that he bought from the Ben I. Tanner Land Company, Dr. Frink appears to have been insolvent when this action was commenced. This feature is not controlling and is only mentioned to show that it was not overlooked.

From a review of the record and the law applicable thereto, we conclude that the testimony does not support the decree of the learned trial court, and the judgment is therefore

REVERSED.

SEDGWICK, J., not sitting.

LOUIS REINHARDT V. STATE OF NEBRASKA.

FILED OCTOBER 2, 1917. No. 20124.

1. **Adultery:** PROOF. Adultery, like any other fact, may be established by circumstantial evidence.

2. ———: EVIDENCE. The evidence examined, discussed in the opinion, and *held* that the testimony of the complaining witness is corroborated by competent testimony with respect to the commission of the offense charged against defendant.

3. **Criminal Law:** VERDICT: REVIEW. "It is the province of the jury to determine disputed matters of fact in criminal as well as in civil cases. The verdict will not be set aside in this court upon proceedings in error for want of evidence to support it, unless it is clearly wrong." *Henry v. State*, 72 Neb. 252.

4. ———: ADULTERY: INSTRUCTION. In a prosecution for adultery, the court of its own motion gave an instruction to the jury that is set out and discussed in the opinion. *Held*, that the instruction so given was, under the circumstances of this case, without prejudice to the defendant.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

R. J. Millard, for plaintiff in error.

Willis E. Reed, Attorney General, and *Alfred C. Munger, contra.*

DEAN, J.

The defendant, who is a married man, was convicted in the district court for Cedar county of committing adultery with Minnie Lee, an unmarried woman, aged eighteen, and sentenced to a term of three months in the county jail. He has brought the case here for review.

The defendant is a farmer residing on a farm with his wife and two children. The woman with whom the defendant is charged with having had adulterous relations is his wife's sister. Miss Lee came to the Reinhardt home on August 1, 1915, and with a few interruptions this seems to

have been her home for most of the time from that date until June 13, 1916, when she returned to the home of her step-father living in the same county. Two days thereafter she was there delivered of a babe, fully developed. She maintains that defendant is the father of her child. He stoutly denies its paternity. While she was at the Reinhardt home she assisted in the housework, did chores, helped defendant with the milking, and apparently helped generally in the work about the premises.

Prosecutrix testified that defendant had sexual intercourse with her, the first time, on September 4, 1915, and two or three times thereafter in the same month, the last time being on the 26th, and that all of the illicit acts complained of were committed in defendant's home and while his wife was away getting family supplies at their trading town or visiting among the neighbors. She says that he accomplished his purpose by overpersuasion and always against her will. In October, 1915, she began to suspect pregnancy, and upon telling defendant about her probable condition she testified that he told her "not to worry, he would get rid of it for me." She testified that about two days before her child was born she talked with defendant about her unfortunate condition when they were alone in his home, and that he then told her the name and address of a maternity hospital in Omaha, telling her that it was the place for her to go, and that when she told him she could not remember the name nor the address of the institution, he wrote it on a slip of paper and gave it to her. This paper in defendant's handwriting containing the address of the hospital is in evidence. On the same day and at the same time she said that he gave to her $12 to pay the expenses of the trip. She said she had a small sum of money in a bank in his name at the time, but this was not mentioned, and she understood that the money he gave her was his own. It is in evidence that Miss Lee concealed her condition from her mother until very shortly before the birth of her babe. Her mother testified that when her daughter told her that she expected to become a mother, she also

told her that a Coleridge man was the father of the child, and that she afterwards said that the defendant "told her to tell that, and not tell on him because it was a penitentiary act." It seems that she talked with no one except defendant about her condition until within a few days of the birth of the child. The complainant's stepfather testified that she and the defendant, for a period of about 10 days in the early part of September, 1915, while he was at the Reinhardt home, were frequently alone together, and that no other man was there during his stay in that month. The prosecutrix testified that she never had sexual relations with any other man than the defendant, and that she kept company with no other man during September.

The defendant denied ever having had sexual intercourse with the complaining witness, and also practically all of the material testimony offered by her. The question whether Miss Lee was at the Reinhardt home during the month of September, as she testified, is material in view of other facts in the case. On this point defendant and his wife both testified that in September she was at Coleridge for a few days, and at Hartington about fair time for perhaps a week, and that once or twice she was away from home over night at the home of some of the neighbors, one of whom the defendant named. This testimony is important if true, and if true it seems that it would have been corroborated by the testimony of disinterested witnesses who saw her when she was away from defendant's home. With the exception of one man who testified to seeing her at the fair in his automobile and seated by the side of his own daughter, no corroboration appears, and we conclude the jury must have disbelieved the testimony of both the defendant and his wife on this point. Besides, Miss Lee not only testified that she was at the Reinhardt home continuously in September, but she testified that she did not know the owner of the automobile, and denied the automobile incident altogether. Mrs. Reinhardt alone testified that there were one or more hired men who worked on the place in September, and that one of them, a 19-year old

boy, was there for a part of the time overnight. But no significance can attach to this circumstance, because it is not even attempted to be shown that the prosecuting witness even spoke to these men, much less that she was on terms of criminal intimacy with them. Apparently the jury believed from the testimony that defendant was the only man on the Reinhardt premises with whom Miss Lee was familiarly intimate during September, 1915; so that if the babe that was born to her on June 15, 1916, was begotten in September, 1915, the jury were justified in concluding that defendant was its parent, and to this extent the date of its birth is corroborative of her testimony that she had sexual intercourse with defendant in that month.

It is obvious that testimony as to the date of birth of the child might be admissible as corroboration in proof of adultery under some circumstances, and that such testimony would not perhaps be admissible under others. On this point we believe that an inflexible rule cannot be established that is equally applicable in all cases. The testimony appears to have been fairly presented, and the jury as triers of disputed questions of fact having determined the controversy, we are not disposed to disturb their verdict. It is disclosed that the testimony of the prosecuting witness was sufficiently corroborated, and we find no sufficient reason for setting aside the verdict of the jury.

Defendant complains of instruction No. 5, given by the court of its own motion. The instruction follows: "The question as to who is the father of the child born to Minnie Lee on June 15th, 1916, is immaterial except as the date of the birth corroborates the witness as to day of carnal knowledge charged in the information. And the fact, if it be a fact, that the father of said child is some other person than the defendant, would not relieve the defendant of the charge alleged in the information, if the jury believes beyond a reasonable doubt that defendant is guilty of adultery as charged in the information beyond a reasonable doubt as explained in these instructions."

In oral argument counsel for defendant admitted that "the instruction is correct as an abstract proposition of law," but he argues in his brief that the instruction as given has "a tendency to inject a false issue into the case. The question at issue was not as to who is the father of a particular child. It is not a bastardy case. The instruction would seem to indicate that we were trying to establish the parentage of the child as a defense. This was misleading and prejudicial." In oral argument, also, he cited *Commonwealth v. O'Connor,* 107 Mass. 219, a case where the defendant was charged with committing adultery with an unmarried woman. It was there held that evidence is inadmissible that the complainant "was delivered of a child which might have been begotten about the time of the offense charged." But in the *O'Connor* case only a few of the attendant facts are discussed, so that we are unable to say that the rule there announced should be accepted as an expression of substantive law that is properly applicable to the case before us. *Clark v. State,* 170 Ala. 101, holds to a rule directly contrary, where the same question was involved. We cannot adopt defendant's theory with respect to the instruction complained of. Its language is not susceptible of strained construction, and we do not see how it could have misled the jury. Under the circumstances presented by the record before us, we are unable to say that it was prejudicial to the defendant.

Discovering no reversible error in the record, the judgment of the trial court is

AFFIRMED.

EDWARD PRUSS, SR., APPELLANT, V. FRANK SCHULTZ ET AL., APPELLEES.

FILED OCTOBER 13, 1917. No. 19466.

Appeal: TECHNICAL ERRORS. A judgment will not be reversed merely on account of a technical error which does not affect the substantial rights of the appellant.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

John M. Macfarland and *Thomas J. Keenan,* for appellant.

Jefferis & Tunison, A. H. Murdock and *A. C. Pancoast, contra.*

LETTON, J.

This is an action in replevin brought by Edward Pruss, Sr., against Frank Schultz and C. F. Huntzinger. A trial was had and verdict rendered, which was set aside and a new trial ordered. Afterwards Frank P. Lewis intervened.

The petition alleged, in substance, that on January 14, 1910, the plaintiff was the owner of and entitled to immediate possession of certificate of membership No. 126 in the South Omaha Live Stock Traders Exchange, issued in 1908 to Edward Pruss, Jr., the son of plaintiff; that the certificate had been assigned and indorsed by the latter to plaintiff; that it was placed in the name of Pruss, Jr., so that the latter could buy and sell cattle upon the exchange. Huntzinger answered denying any interest in the certificate, and stating that it was in his hands as secretary of the exchange. Schultz answered that he purchased the certificate in December, 1909, from Frank P. Lewis, without any knowledge of any claim on the part of Edward Pruss, Sr., or Edward Pruss, Jr. He asked that he be adjudged the owner of the same. In the

petition in intervention Lewis alleged that Pruss, Sr., and Pruss, Jr., pledged and delivered the certificate to him as security for moneys to be advanced to them for trading in live stock; that he advanced at various times money to the amount of $820.83; that in 1909 he sold the certificate to Schultz; that after this suit was commenced he refunded the purchase price to Schultz and took back the certificate, and that he now claims a lien thereon and a special ownership therein for the sum of $820.83, with interest at 7 per cent. from January 13, 1909, for money advanced to Pruss, Jr. He asked judgment for the possession of the certificate until the amount due him has been paid. The jury found that Lewis was entitled to possession of the property and that the value of the possession was $410. Judgment was rendered accordingly.

The brief of appellant is not prepared in accordance with rule 12 (94 Neb. XI) of the court, which is designed to aid the court by clearly specifying the points in dispute, clarifying the issues, and thus securing a better understanding of the contentions of the complaining party, but several complaints seem to be made.

It is urged that, since Lewis had sold the certificate to Schultz, the verdict finding that the right of possession was in Lewis at the time the action was commenced is erroneous. In a certain sense this is true, but under the circumstances of this case it is not prejudicial to plaintiff. It is undisputed that the real owner of the certificate was the plaintiff Edward Pruss, Sr. He purchased it with his own money and procured it to be transferred and issued in the name of his son so that the son might buy and sell stock as a member of the exchange. The actual dispute is with reference to whether the certificate was ever pledged as security for money furnished Pruss, Jr. Lewis, who was in the business of furnishing office facilities, bookkeepers and credit to traders upon the exchange for a commission on each head of cattle sold, testified that both the senior and junior Pruss were

present in his office at the time when the certificate was indorsed in blank by Pruss, Jr., and that the certificate was delivered to him by the senior Pruss; that afterwards he advanced money to Pruss, Jr., on the strength of the pledge, until December, 1908; that the senior Pruss several times examined the account kept in the name of the junior. Afterwards Pruss, Jr., was expelled from the exchange, and Pruss, Sr., with the assistance of Lewis disposed of the cattle he had on hand. Pruss, Jr., was afterwards reinstated as a member of the exchange. Lewis then contracted to sell the certificate to Schultz, and, according to the rule of the exchange, Schultz made an application for the transfer of the certificate on the books of the association from the name of Pruss, Jr., to himself. Pruss, Sr., then filed a protest with the secretary of the exchange against the exchange, which was delayed on this account, and the certificate was taken from the secretary by the writ issued in this case. Some time after the suit was begun it was agreed between Lewis and Schultz that the sale might be rescinded on account of the inability of Lewis to deliver the certificate. Lewis therefore succeeded to the interest of Schultz during the pendency of the action.

Under section 7832, Rev. St. 1913, the action might have proceeded in the name of Schultz. A verdict in his favor would have inured to the benefit of Lewis.

There is a direct conflict in the evidence as to whether the certificate was pledged to Lewis or merely left with other papers in a desk in his office. The preponderance is with the intervener upon this issue.

The verdict of the jury is amply supported by the evidence. We find no prejudicial error, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

SIDNEY T. FRUM, APPELLANT, V. GEORGE W. LEAMER, APPELLEE.

FILED OCTOBER 13, 1917. No. 20108.

Elections: CONTEST: EVIDENCE. In a proceeding under the Nebraska statutes to contest an election on the statutory ground that sufficient votes to change the result were illegally counted for contestee, contestant may introduce in evidence properly preserved ballots themselves without first making proof of the charges in his complaint, facts stating such statutory ground being alleged in specific terms. Rev. St. 1913, secs. 2095, 2124.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed.*

R. E. Evans and *Sidney T. Frum,* for appellant.

Fred H. Free and *J. J. McCarthy, contra.*

ROSE, J.

This is a controversy between two rival candidates for the office of county attorney of Dakota county to contest the election held November 7, 1916. According to the county canvassing board, contestee had a plurality of 13 votes, and he was declared elected. Contestant complained that sufficient votes to change the result of the election were illegally counted for contestee. The contest was commenced in the county court. There the ballots cast in the voting precints were rejected as evidence on the ground that no preliminary proof of error or mistake in the counting of the votes had first been adduced. A dismissal of the contest followed. Contestant appealed to the district court, with the same result for the same reason. This is an appeal from the judgment of the district court to review the ruling that the ballots are not available as evidence in advance of proof of contestant's charges.

The judicial opinions on the question presented are not harmonious. Some courts in construing legislation have

held that, while the ballots themselves are the best evidence of the result of the election, contestant, to make them available, should first offer proof tending to show that his charges are true; there being no reason to question or to examine the official returns or the ballots in advance of such proof. *Quigley v. Phelps,* 74 Wash. 73, Ann. Cas. 1915A, 679; *In re Tarr,* 93 Ohio St. 199. There is reason for this doctrine, where the legislature has left the courts free to prevent an examination of ballots and to terminate expensive or irritating litigation, unless there has first been proof of fraud or mistake affecting the result of the election. On the other hand, it has been held that, without any preliminary proof of fraud or mistake, the ballot boxes may be opened and the contents examined to sustain the charges of contestant. *People v. McClellan,* 191 N. Y. 341. In the cases cited, however, the statutes construed are not exactly like those under which contestant proceeded in the present case. It is therefore necessary to examine the Nebraska statutes and the issues presented by the pleadings.

An election contest may be instituted by the filing of a complaint "verified by the affidavit of the contestant that the causes set forth are true as he verily believes." Rev. St. 1913, sec. 2113. Contestant is required to file a bond "to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail." Rev. St. 1913, sec. 2113. The trial court has power to make any necessary "order concerning immediate costs." Rev. St. 1913, sec. 2118. "The election of any person to any public office" may be contested, says the statute, "when illegal votes have been received or legal votes rejected at the polls sufficient to change the result," and "for any error in any board of canvassers in counting the votes, or in declaring the result of the election if the error would change the result." Rev. St. 1913, sec. 2095. Some of the statutory provisions follow:

"The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the con-

trol and direction of the court, which shall have all the powers necessary to the right hearing and determination of the matter. * * * It shall be governed by the rules of law and evidence applicable to the case." Rev. St. 1913, sec. 2118.

"If an inspection of the ballots or poll books of any election district in this state shall become necessary for the determination of any election contest before any court, the presiding judge thereof may by order, naming the district or districts, require the proper officer to procure the same from the county clerk, or other person in whose possession or custody the same may be, and such clerk or person shall deliver the same to said officer, who shall deliver them unopened to such presiding judge." Rev. St. 1913, sec. 2124.

"The presiding judge shall open and inspect the same in open court, in the presence of the parties or their attorneys, and immediately after such inspection shall again seal them in an envelope and return them by mail or otherwise to the office of the county clerk in which they were at first required to be filed." Rev. St. 1913, sec. 2125.

The statute enumerates a number of grounds of contest, among them being ineligibility, conviction of a felony, and offer to bribe an elector. In a contest on these grounds alone an inspection of the ballots is unnecessary. The complaint is based on other grounds. It is alleged that there are eight precincts in Dakota county, and that in each votes sufficient to change the result of the election were illegally counted for contestee; the allegations in regard to Omadi precinct being as follows:

"That in said Omadi precinct the return of the election board of said precinct, and the official canvass thereof, shows that, out of 280 votes cast in said precinct for the office of county attorney, this contestant received 156 votes and the contestee received 124 votes. This contestant alleges and states that in said Omadi precinct contestant received 190 votes and contestee received not

to exceed 90 votes, and that the said votes in said precinct were irregularly, incorrectly and wrongfully counted and returned by the election board of said precinct, and were wrongfully canvassed by said canvassing board, and had the votes in said precinct been correctly counted, this contestant would have received, and did receive, not less than 190 votes for the office of county attorney in said precinct.

"That in said Omadi precinct in said county, at said general election, 14 ballots were cast by persons whose names are to this contestant unknown, on which said ballots no person was voted for, for the office of county attorney of said county, which ballots were illegally counted by said election board of said precinct for contestee, canvassed for the contestee by the said canvassing board of said county; that at least 34 ballots and votes cast for the contestant for the office of county attorney were illegally and incorrectly counted for the said contestee, George W. Leamer, and were canvassed for him by the said canvassing board of said county, and said 34 ballots so cast and voted for this contestant, or any of them, were not counted for this contestant by the said election board, and were not canvassed for said contestant by the said canvassing board, but said ballots were counted and canvassed for said incumbent."

The truth of these allegations was put in issue by the answer. After it was shown that the ballots cast in Omadi precinct had been preserved by the proper officers in the condition in which they were received by the election officers from the voters, and after the county clerk had produced in court the ballots from this precinct, they were offered in evidence and rejected. Was the ruling erroneous?

It will be observed that specific facts constituting a ground for a contest under the statute are confined to a specified election district. A correct count of the ballots would determine the issue without other proof. The statute seems to contemplate the taking of such a course.

Without requiring a contestant to conform to the Code of Civil Procedure, he is authorized to begin a contest by filing a complaint verified by an affidavit that the causes set forth are true as he verily believes. To prevent captious or meddlesome contests and to protect contestee and the public, contestant is required to file a cost bond. In addition, the court is authorized to make any necessary "order concerning immediate costs." The proceedings are under the control and direction of the court. As already stated, some of the statutory grounds do not require an inspection of the ballots, but if, in the language of the statute, an inspection of the ballots of an "election district" becomes "necessary for the determination" of the contest, the presiding judge may demand their production, and, when produced, he is required to open and inspect them in the presence of the parties and their attorneys. The legislature did not require preliminary proof of error or mistake as a condition of scrutinizing the ballots. An implied restriction that properly preserved ballots themselves cannot be examined, in the first instance, to prove a mistake does not seem to be consistent with the statutory procedure outlined. The public is interested in the election, in a correct count, and in the result. The force of the arguments on the sacredness of the ballot, on the integrity of the official returns, on the correct rules of evidence, and on the invoking of the power of the court to discover evidence is fully recognized, but the aim and import of the statute, as shown by the language of the lawmakers, are controlling considerations. The better construction permits the inspection of properly preserved ballots to support a charge of fraud or mistake in a specified election district, changing the result of the election, where that issue is raised by specific allegations stating a ground of contest, though preliminary proof in support of the complaint has not been first adduced.

For error in excluding the ballots, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

I. L. VAN SANT, APPELLEE, V. MATTHEW J. BEUDER, APPELLANT.

FILED OCTOBER 13, 1917. No. 20184.

1. **Landlord and Tenant:** LEASE: CONSTRUCTION. A farm lease, "for the term of one year with the privilege of three years subject to sale," construed to authorize lessor, by means of sale and notice, to terminate the tenancy at the end of any rental year during the three-year period.

2. **Forcible Entry and Detainer:** RIGHT OF POSSESSION. In an action of forcible detainer, the contest is limited to the naked right of possession.

APPEAL from the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Baker & Ready and *W. R. Patrick,* for appellant.

Ringer & Bednar, contra.

ROSE, J.

This is an action of forcible detainer for 54 acres of land in Sarpy county. From a judgment in favor of plaintiff, defendant appealed.

When Lelia B. Van Sant was owner of the property she leased it to Matthew J. Beuder, defendant, October 10, 1914, for the term of one year with the privilege of three years subject to sale, the first year to begin March 1, 1915, and to end March 1, 1916. Exercising the privilege thus granted, the land not having been sold during the first year of tenancy, defendant remained in possession of the premises. I. L. Van Sant, plaintiff, purchased the land from the lessor February 19, 1917. The next day plaintiff and his grantor joined in a notice to defendant that the demised premises had been sold and to vacate on or before March 1, 1917, the end of his second rental year. Defendant claimed the right to remain in possession until the end of the three-year period and refused to vacate. This action was instituted March 14,

1917. Following the language of the contract, which is in writing, the premises were leased to defendant:

"For the term of one year with the privilege of three years subject to sale on the 1st day of March, 1915, to end on the 1st day of March, 1916, at the rental of four hundred twenty-five dollars a year to be paid as follows, to wit: One hundred dollars cash, for which receipt is acknowledged, on the 10th day of October, 1914; one hundred twenty-five dollars, payable on the 1st day of March, 1915, and the balance, two hundred dollars, payable as follows: One hundred dollars the first day of September, 1915; one hundred dollars on the first day of January, 1916."

Another provision of the lease follows: "And the said renter, M. J. Beuder, hereby agrees to pay as the rent of said premises, for said term, the sum of four hundred twenty-five dollars."

A further stipulation reads: "At the expiration, or on the termination, of this lease from any cause, said lessee will, without further notice of any kind to quit, surrender up the peaceable possession of said premises to the said lessor."

The question presented by the appeal is the meaning of the expression, "For the term of one year with the privilege of three years subject to sale," as it appears in the lease considered as a whole. Defendant takes the position that the lessor had no right to disturb the tenancy by a sale after expiration of the first-year period, since no sale had been made during that time, and since defendant had exercised his privilege to retain the premises for two years more. The point is stated by defendant in another form:

"It therefore seems evident that the term 'subject to sale,' if it has any meaning at all, can be construed only as a limitation upon the right of the lessee to make his election for the extension of the term from one year to three years."

The lease itself seems to have a different import. The words, "subject to sale," limit the demise or the lease-

hold and apply to both periods of time. The lease is partly printed and partly written, the words italicized in the following paragraph being written in blanks with a pen:

"For the term of *one year with the privilege of three years subject to sale* on the *1st* day of *March,* 1915, to end on the *1st* day of *March,* 1916, at the rental *of four hundred twenty-five dollars a year.*"

The dates apply to the printed words, "the term," and do not limit the time for exercising the right of sale. Except for the expression "subject to sale," the tenancy, without regard to the length of the term, could not be disturbed by sale. The parties evidently meant to subject the tenancy itself to the right of sale, and the exercise of that right is not limited by the lease to any particular period. The lease as a whole, however, including the provisions for paying the rental, indicates that the parties had no purpose to interfere with lessee's possession, except at the end of a rental year. This seems to be the natural and reasonable construction of the language used by the parties and is consistent with the purposes of a farm lease, where the premises are for sale. Thus construed, the terms would appear satisfactory to both parties when making and executing the contract. Lessor's wish to sell her real estate would be protected. Lessee would realize the uncertainty of his tenure and would be warned to manage his leasehold accordingly. A resort to extraneous evidence, for the purposes of interpretation, is unnecessary.

It is argued, however, that this construction would sanction a forfeiture of improvements and crops. A lessee cannot prolong his stipulated tenure merely by making improvements or by planting grain in autumn, where his contract does not so provide. Compensation for improvements and crops, where the tenancy may be terminated by a sale of the demised premises, is a proper subject of negotiation and contract. Though leases of that nature generally contain provisions for such compensation and are enforceable, no reference to that subject is found in

the lease in controversy here. Defendant's lease and tenure were "subject to sale." Under a fair interpretation of the lease, the lessor, by sale, had a right to terminate the tenancy at the end of any rental year. The land was sold during the second rental year and defendant was not notified to vacate before the end thereof. Compensation for improvements and crops was not a condition of restitution, but defendant had agreed to surrender possession upon termination of the lease from any cause. Within the meaning of the lease, the tenancy, by sale and notice, was terminated at the end of the second rental year, and the right to restitution did not depend on compensation for improvements and crops.

In an action of forcible detainer, "the contest is limited to the naked right of possession of the premises." *Dawson v. Dawson*, 17 Neb. 671. This rule was recently approved. *Knapp v. Reed*, 88 Neb. 754.

The judgment of the district court is in harmony with these views of the case.

AFFIRMED.

SCHOOL DISTRICT, APPELLEE, V. A. K. WILSON, APPELLANT.

FILED OCTOBER 13, 1917. No. 19093.

1. **Schools and School Districts:** HIGH SCHOOLS: POLICY OF STATE. It is the established policy of the people of this state through their legislature to furnish free high school education to all the youth of the state without distinction or discrimination.

2. ———: ———: ———. The law requires each county of the state to establish a high school, if necessary, so that all the youth of the county can have free high school privileges. And there is no statute requiring that the parents of children qualified for and entitled to high school privileges shall be required to pay for such privileges for their children.

3. ———: ———: TUITION. If a resident of a school district having no free high school applies under the statute to the county superintendent "for free high school education" in an adjoining district having such high school, and the superintendent upon investigation makes the necessary certificates for that pur-

pose, and the children of school age having such certificates attend such high school without objection or question on the part of the school officials, the law will not imply an agreement on the part of their parents to pay for such privileges. The law will not imply that which the evidence clearly shows did not exist.

APPEAL from the district court for Furnas county: ERNEST B. PERRY, JUDGE. *Reversed and dismissed.*

J. L. Rice and *John Stevens,* for appellant.

Lambe & Butler, contra.

SEDGWICK, J.

This defendant, while residing in school district, No. 105, in Furnas county, which district had no high school and no facilities for high school education, sent his children of school age to the high school in the adjoining district, No. 15. After they had attended that high school for some time, this action was brought by school district No. 15 to recover $3 a month, which it was alleged "the defendant impliedly and by operation of law agreed to pay the plaintiff for the said school privileges." The plaintiff recovered a judgment in the district court, and the defendant has appealed.

The plaintiff contends that under the provisions of the act of 1907 (Laws 1907, ch. 121) as amended by the act of 1909 (Laws 1909, ch. 122) there is an implied contract on the part of the parents of these children to pay the specified sum of $3 a month for tuition in the plaintiff's high school.

It has continually been the policy of this country to furnish free educational privileges to all children of school age by general taxation without regard to whether the parents or guardians of the children are situated so as to pay any part of such taxes. It is the established policy of the people of this state through their legislature to furnish free high school education to all the youth of the state without distinction or discrimination.

In 1907 the legislature provided for free public high school education. Laws 1907, ch. 121. The title of the act

was: "An act to provide four years of free public high school education for all the youth of this state whose parents or guardians live in public school districts which maintain less than a four-year high school course of study, and to repeal all acts and parts of acts in conflict herewith." And the first section began with these words: "Provision is hereby made for four years of free public high school education for all the youth of this state whose parents or guardians live in public school districts which maintain less than a four-year high school course of study, on the following conditions, to wit." The conditions that follow are quite elaborately set forth and apply generally to all children of the state without regard to location or residence. At the same session of the legislature there was an act (Laws 1907, ch. 122) the object of which, according to the title, was: "To provide for free high school education, to establish and locate county high schools, * * * to levy a tax for the support and maintenance of such county high schools; to provide for a county high school fund and the allowance of claims against such fund." Under this act any county in the state "may establish a county high school on the conditions and in the manner" therein prescribed for the purpose of affording "all grades above the eighth grade." The act provided for submitting the question to the electors of the county as to whether such high school should be established.

In 1913 an act was passed (Laws 1913, ch. 252) entitled: "An act to provide for the organization of county high schools in counties not having a twelfth grade high school." The act provided: "The county board of any county in this state that does not have organized within the borders of such county a twelfth grade high school accredited to the state university, shall be deemed authorized and it shall become their duty" to take steps necessary to provide a board of regents for such high school.

In 1915 an act was passed (Laws 1915, ch. 120) repealing the provisions of the former act in regard to sub-

mitting the question to the voters, and providing: "A county high school shall be established by every county in which there is not now located a twelfth grade high school accredited to the state university in the manner hereinafter prescribed for the purpose of affording better educational facilities for pupils who have advanced beyond the eighth grade."

The title of the act of 1907 declares the purpose of the act, and all other legislation upon this subject keeps that purpose distinctly in view.

The Constitution provides that the subject of legislation must be clearly expressed in the title of the act. The object of this provision is to prevent surreptitious legislation. The people of the state would not expect legislation under this title that would deprive the children of indigent parents of the privilege of free high school education, and the provisions of the act of 1907 were in harmony with the promise held out in the title of the act. If an attempted amendment to this act should so far depart from the subject expressed in the title as to amount to surreptitious legislation, such amendment would be invalid under the constitutional provision. It is seriously contended by the defendant in this case that the amendment of 1909 is unconstitutional and void. This court is so reluctant to declare an act of the legislature unconstitutional that we have concluded that this case can be decided without determining that question.

In *High School District v. Lancaster County*, 60 Neb. 147, the question was raised "whether the fact that under this act the taxpayers of such districts are compelled to pay the whole of the expense of educating pupils resident in such district, and in addition thereto the proportion of the expense of educating nonresident pupils, affects the question of the constitutionality of the act," but it was not found necessary in that case to determine that question. That objection has been obviated in sub-

sequent legislation authorizing and requiring each county of the state to establish a high school, if necessary, so that all the youth of the county can have free high school privileges. An act passed in 1907 (Laws 1907, ch. 122) was entitled an act "to provide for free high school education, to establish and locate county high schools," and provided for a special election at which the voters of the county could determine whether such free high school should be established. In 1913 (Laws 1913, ch. 252) it was enacted that it should be the duty of the county board of any county in this state that does not have organized within the borders of such county a twelfth grade high school, to provide for a board of regents for a county high school, and it also provided that "the county high school herein provided for by law shall be located at the county seat of such county." From these and similar acts it is manifest that the people of the state intended that each county should furnish high school privileges to all the youth of the county where such privileges were not otherwise provided for. Indeed the act so provided in express terms. Rev. St. 1913, sec. 6831. There is no statute that expressly provides that the parents of children qualified for and entitled to high school privileges shall be required to pay for such privileges for their children. Every expression of the legislature upon that subject seems to contemplate that high school privileges shall be free to all the youth of the state. It cannot be said then that there is in this state any law fixing such liability upon the parents.

The question remains for consideration whether, under the conditions shown to exist in this case and the provisions of our statutes, an agreement on the part of this defendant to pay this tuition should be implied. The statute provides: "Every pupil, to be entitled under the provisions of this article to *free public high school education* in the ninth grade of any public school district maintaining such grade, must have a certificate signed by the

county superintendent of the proper county that he has completed the course of study prescribed by the state superintendent for work below the ninth grade as set forth in the first condition of this section and that he is unable to secure ninth grade work in the public school district of his residence." Rev. St. 1913, sec. 6813, subd. 2. And there is the same provision in regard to each grade above the common school grades. The same section (subdivision 6) provides: "Every nonresident pupil attending any public school under the provisions of this article shall have the same rights and shall be subject to the same rules and restrictions which govern resident pupils attending such public school. Any public school district unable to furnish accommodations to nonresident pupils, without constructing or renting additional buildings, hiring extra teachers, or other reasonable cause, may refuse admission to any or all such nonresident pupils." The general provision for nonresident pupils in the common schools provides that the school board "may determine the rates of tuition of the pupils and collect the same in advance, but no tuition shall be charged such children as are or may be by law allowed to attend the school without charge." Rev. St. 1913, sec. 6784. It is admitted in this case that the defendant applied to the county superintendent under the statutes "for free high school education" of his children in the plaintiff district, which was adjoining the district in which the defendant resided, stating in his application "the number of pupils for whom free high school was desired;" and that during the time that these children attended the plaintiff high school they "each had a certificate duly signed by the county superintendent" required by the statute. Section 6831, above cited, after providing that "tuition shall be free to all pupils residing in the county where the school is located," provides for the admission of pupils from without the county "upon the payment of such tuition as the board of regents may prescribe." When these schol-

ars entered the plaintiff high school with the certificates of the county superintendent, which the statute requires, in their possession, it seems that the plaintiff district did not raise the question whether they were entitled to free tuition, and did not prescribe any terms of tuition, as contemplated by section 6831, in case of students that were not entitled to free tuition. They did not pursue the course pointed out in the statute in case of the common schools in general as indicated in section 6784. Under that section it is required that the board determine the rates of tuition and collect the same in advance, and ordinarily, if that was not done, it might be because of the further provision of that section that "no tuition shall be charged such children as are or may be by law allowed to attend the school without charge."

The law in many cases implies a contract to pay for services received, but not in cases where, as in this case, it is doubtful whether the party claiming compensation is entitled thereto from the party with whom he deals, and where the existing conditions and the conduct of the parties are entirely inconsistent with the existence of such a contract. The defendant claimed that he was entitled to free high school privileges for his children. That was what he expressly applied for, and the school district took no such action as the statute contemplates in case the party applying was not entitled to such free tuition; and so, instead of an implication of an agreement to pay, it clearly appears that no such payment was contemplated by the defendant, as the school officials and all parties knew. The law will not imply that which the evidence clearly shows did not exist. We do not think that the defendant is liable for the payment of tuition. The case was submitted to the trial court upon a stipulation. There is no disputed fact.

The judgment of the district court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., not sitting.

CLOW F. ADAMS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED OCTOBER 13, 1917. No. 19995.

1. **Municipal Corporations: FIREMEN: COMPENSATION.** The statutes reserve to the state the right to fix the compensation of firemen in cities of the metropolitan class.
2. ———: ———: ———. Section 4210, Rev. St. 1913, as amended by chapter 77, Laws 1915, fixes the compensation of firemen in metropolitan cities, and the city authorities have no power to provide different compensation.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

John A. Rine, W. C. Lambert and *L. J. Te Poel,* for appellant.

Rosewater, Cotner & Peasinger, contra.

SEDGWICK, J.

The question in this case is whether a city of the metropolitan class has the power to regulate the compensation of firemen, or the state has reserved to itself that power and has fixed their compensation. The Banning Act gave all cities of the state having a population of 5,000 or more general powers of self-government. Section 11 of the Banning Act (Laws 1911, ch. 24) provides that the city council shall have "all executive or legislative or judicial powers and duties hitherto held, possessed or exercised under the then existing laws governing any such city, by the mayor or mayor and city council," etc., with a proviso in regard to the water board of metropolitan cities and other matters which do not affect this question. When this Banning Act was enacted there was in force in this state a statute fixing the salaries of police officers and members of the fire department in cities of the metropolitan class (Rev. St. 1913, sec. 4210), so that when this act was enacted the

city authorities had no power to fix such salaries, and therefore it would seem that the power to fix the salaries was not included in section 11. Of course, there can be no doubt that the state, because of the interest that the state at large has in enforcing the laws and in protecting property from fire, has jurisdiction over the police and the fire department. Again, section 19 of the Banning Act provided: "All general state laws governing the several classes of cities described in this act shall, according to the class within which it is embraced, apply to and govern any city adopting this act." As above suggested, it would seem that the interests of the state in the police and fire protection would bring it within the jurisdiction of the state to regulate those matters, and that the statute above quoted was a general statute of the state governing cities of the metropolitan class.

It will further be observed that afterwards the legislature has assumed to regulate those matters by amending section 4210, Rev. St. 1913. In 1915 (Laws 1915, ch. 77) the salaries of policemen and firemen are specifically fixed by the legislature in an act amending section 4210, and repealing that section. That section seems to fix the salaries of these officers at $100 a month. The district court so held, and its judgment is therefore

AFFIRMED.

ROSE, J., not sitting.

EMMA KAUFMANN PALMER, APPELLANT, V. THOMAS E. PARMELE, APPELLEE.

FILED OCTOBER 13, 1917. No. 20196.

1. **Pledges: SALE: LIABILITY FOR SURPLUS.** If a creditor who holds collateral security for his claim sells the securities and realizes more therefor than the amount of his claim, and refuses to pay the owner of the securities the remainder of the money received therefor after satisfying his claim, he is liable in an action for conversion of such surplus.

2. ———: ———: ———. The facts in this case, stated in the opinion, required the defendant to account to the owner of the collateral for the amount received and applied thereon by defendant.

APPEAL from the district court for Cass county: JAMES T. BEGLEY, JUDGE. *Reversed.*

D. O. Dwyer, for appellant.

Jesse L. Root and *C. A. Rawls, contra.*

SEDGWICK, J.

In the early part of 1910 the defendant sold to William Volk for $15,000 gold coupon bonds of $10,000 face value and preferred stock of $5,000 face value in the Norfolk Long Distance Telephone Company of Norfolk, Nebraska. Volk left this stock with Parmele for safe-keeping, and took Mr. Parmele's receipt reciting that fact, in which it is also agreed that the stock should remain in the Bank of Commerce of Louisville, Nebraska, in which the defendant was interested, for the term of five years, "and the income to be paid over to William Volk as paid." After Mr. Volk's death this plaintiff began this action against the defendant to recover the value of the stock, alleging that Mr. Volk in his lifetime, "being engaged to be married to plaintiff, gave said bonds and stock to plaintiff, and at the time delivered the same to plaintiff by delivering to her said written instrument of the defendant." She appears to have had the defendant's receipt for the stock in her possession. The defendant alleged that he had no notice of such gift by William Volk to the plaintiff, and that Mr. Volk had in his lifetime deposited the stock with this defendant as collateral security for such loans of money as the defendant and the banks in which the defendant was interested might make to Mr. Volk, and that he and the banks had pursuant to that agreement loaned to Mr. Volk money at different times amounting in the aggregate to a large sum, and that all of the property of the Norfolk Company (of

which the bonds in question were part) had been sold, upon an action in foreclosure of the bonds, and that the amount realized was not sufficient to pay the bonds, and the *pro rata* share applicable upon the $10,000 bonds of Mr. Volk was not sufficient to pay the indebtedness of Mr. Volk so incurred to the defendant and the said banks. The jury found a verdict for the defendant, and, judgment being entered thereon, the plaintiff has appealed.

It is not claimed that the defendant by this transaction with Volk became the owner of the bonds and stock. If the money advanced thereon to Volk was repaid the defendant had no right in the surplus value of the bonds and stock. It appears to have been held upon the former appeal in this case (*Kaufmann v. Parmele,* 99 Neb. 622) that the evidence was not disputed that the plaintiff was the owner of the bonds and stock, subject to such interest as the defendant might have in the same as collateral security. At the foreclosure sale all of the property of the Norfolk Long Distance Telephone Company was purchased in the name of this plaintiff for $20,000, and as that was two-thirds of the appraised value the same was confirmed by the court. The defendant insists that that fixed the value of the property and therefore the amount that could be applied upon the bonds, and established that the stock was worthless as the property was insufficient to pay the bonds which was the first lien upon all the property of the company.

The amended petition of the plaintiff sues as for a conversion, and much of the discussion in the briefs is upon the question whether this sale regularly made in the interest of all parties could amount to a conversion on the part of the defendant. We cannot see that this discussion is important. It appears that the defendant immediately transferred all of the property of the company to the Nebraska Telephone Company and received $50,000 for it. This money was paid to the Norfolk Long Distance Telephone Company and was distributed to the

bondholders in proportion to the amount of their bonds. In this distribution this defendant received that part of the $50,000 which was apportioned to the $10,000 of bonds in question. If he held these bonds as collateral security, as he says, this money, the proceeds of the bonds, was also collateral security, and, while he might properly apply so much of it as was necessary to extinguish the indebtedness for which the bonds were held as security, the remainder of the money, if any, would belong to Volk or his assignees, and to refuse to pay it over would be a conversion. There is no doubt under this evidence that this $50,000 must be considered as the proceeds of the sale of the property of the company. The evidence of the president of the company, who was called as a witness by the defendant, established that fact. He testified that before the foreclosure there were negotiations between the officers of the Norfolk company and the officers of the Nebraska Telephone Company in which it was understood that the Nebraska Telephone Company would pay $50,000 for the property to the Norfolk company if a clear title to all the property could be transferred. He says that to carry out this arrangement the foreclosure was decided upon, and that the defendant was one of the officers of the company who assisted in the whole of the proceedings, and as this money which the Nebraska Telephone Company paid for the property went to the Norfolk Company pursuant to this understanding and this sale, it follows that the defendant as an officer of the company purchased in this property at the sale for the benefit of the company itself. Therefore the proportion of the $50,000 that was applied upon this stock should have been accounted for to this plaintiff.

The only question remaining is as to the amount then owing to the defendant and the banks he was interested in for which these bonds were collateral. The total amount of the bonds outstanding was $79,000. The proportion of the $50,000 that should have been applied up-

on these bonds would therefore be $6,329.10. Mr. Wood, who was cashier of the bank where Volk's business was principally transacted, testified that these bonds were held as collateral to loans to Volk by the bank and defendant, and was then asked: "I will ask you if you ever figured up the amount due from Mr. Volk to Mr. Thomas Parmele, the defendant in this case, and the Bank of Commerce? A. About the time of Mr. Volk's death, when everything was closed up, it was in the neighborhood of $4,600." If this estimate is somewhere near the truth, the amount received for the bonds in question was "in the neighborhood" of $2,000 more than was chargeable against them. The value of these bonds, less the amount loaned thereon and not returned, would be the measure of the plaintiff's recovery, with interest from the date of the receipt of the $50,000. This is the only question left in doubt, and the case will be remanded for determination of the amount properly chargeable against these bonds on account of advancements to Volk.

REVERSED.

The following opinion on motion for rehearing was filed December 22, 1917. *Rehearing denied.*

SEDGWICK, J.

It is stated in the brief upon the motion for rehearing that "some outstanding bills" and a note to the bank were deducted from the $50,000 which was received for the property of the Norfolk Company, thereby reducing the amount actually received. Our opinion, in which it was said that the amount that should have been applied upon these bonds would be $6,329.10, is modified; and, in addition to the question heretofore submitted to the trial court, that court will also determine whether there were deductions made from the $50,000 purchase price, and so ascertain the net amount received by the Norfolk Company, and compute the

proportion that should have been applied upon these bonds accordingly. It is claimed that there are other errors in the opinion, but it does not appear that they affect the result. The motion for a rehearing is

OVERRULED.

IDA M. YOUNG, ADMINISTRATRIX, APPELLEE, V. WESTERN FURNITURE & MANUFACTURING COMPANY, APPELLANT.

FILED OCTOBER 13, 1917. No. 20078.

Master and Servant: EMPLOYERS' LIABILITY ACT: ACCIDENT. Evidence examined, and found sufficient to sustain the finding and judgment of the district court. *Held*, that the death was an accident within the meaning of the definition given in the employers' liability act (Laws 1913, ch. 198, sec. 52), and that such death grew out of the decedent's employment by the defendant.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

F. M. Hall and *H. W. Baird*, for appellant.

Lincoln Frost and *Guy T. Tou Velle, contra.*

HAMER, J.

The plaintiff, Ida M. Young, administratrix of the estate of Arthur Young, deceased, brought this action in the district court for Lancaster county against the Western Furniture & Manufacturing Company, appellant. It is brought under the employers' liability act (Laws 1913, ch. 198) to recover damages on the ground that the deceased came to his death while in the employ of the defendant and under such circumstances as to make the defendant liable under that act. The evidence shows that the deceased had been employed as a general helper around the defendant's plant for many years. The defendant company was engaged in the business of manu-

facturing mattresses and other articles. The plaintiff's decedent was employed in this branch of the establishment. The briefs for plaintiff and also for appellant speak of the death as occasioned by heat stroke or heat prostration. The evidence shows that the decedent was engaged in cleaning and oiling two motors which were used by the defendant company in its business. These motors were located in the interior of the building on platforms between the ceiling and the floor. The decedent went down from one of the platforms and refilled an oil can, and attempted to ascend the ladder leading to the motors, when he staggered, and, being unable to climb the ladder, the foreman and another employee came to his assistance. They took him out into the air. He said that he wanted to return to work, and they went back with him into the building. He appears to have been only able to wipe his hands on a rag when he fell down again. Later he was taken home, and remained very ill until the time of his death, July 17, 1915. His illness began on the 10th of that month.

In appellee's brief the building where the business of the defendant was carried on is described as being about 55 by 35 feet in dimensions, and constructed of corrugated steel or sheet iron and covered with tarred roofing. The location is said to have been in the southwest portion of the city and lying low with respect to the general elevation. The purpose was apparently to show that the building was located on low ground where the heat might be excessive, and that the building was so constructed that it would be a very hot place to work in. It is said that the roof sloped from a height of about 18 feet on the east side to 12 feet on the west side, and "at such an angle as to allow the sun on a hot July afternoon to concentrate the full force and effect of its rays on said tarred roof." The building seems to have been unplastered. It was divided into four rooms. It is claimed that the deceased met his injury in the room located in the northwest corner of the building. It was the "felt" room where the pick-

ing of the filling for mattresses was conducted. It is claimed by appellee that this room was filled with dust, and that it was customary for the deceased to tie a handkerchief over his nostrils while at work there. While the thermometer stood at about 86 to 87 degrees when Young's attack began, it is claimed that this particular building was "naturally hot in summer." The contention is that a building of sheet iron with tarred roofing and insufficient ventilation, built on low ground, would be a hot place on a summer day in July.

It is contended in the brief of the appellant that the work of cleaning and oiling a motor is not strenuous labor and does not require any great physical effort. The deceased was going about his usual work, and he went about it in his own way, and he had no specific instructions from anybody. It seems that he had been away from his work for three or four days before the fatal attack began. He came back to work on Friday morning, and worked Friday and Saturday morning, and the attack began on Saturday afternoon at 3 or 4 o'clock. It is shown that the deceased may have used intoxicating liquors. He is shown to have used some whiskey at times, which he drank out of a flask, and he had often been seen at saloons in Havelock when Lincoln was dry. He was 57 years of age. It seems that the building in question had been built about 7 years, and that the deceased had worked in it during all of that time. It is claimed that before that time he had worked for the defendant in a hotter building and one more poorly ventilated than the building in question.

On behalf of the defendant it is claimed that the deceased died of heat stroke or sun stroke, and that this sort of illness "is just as much a disease as rheumatism or typhoid." It is thereupon argued that, because it is a disease, death occasioned by it is not an accident, and that the particular section of the statute referred to does not in any way relate to it.

After the evidence was in, counsel for the defendant moved the court for judgment in favor of the defendant on the ground that the petition did not state a cause of action, and that the evidence did not bring the case within the statute. The motion was overruled, and the defendant excepted.

On behalf of the defendant it is strenuously insisted by counsel that Young was not injured in person or body, and that there was no violence to his physical structure, or any disease or infection resulting from his work, and that his sickness or disease, if any, was due to natural causes, and in no way connected with or influenced by his employment, or the character or place of performing his work. It is said that the heat prostration came as a natural result of his own habits and condition of life. It is insisted that there was no accident; that there was no violence to the physical structure of the deceased's body; that the heat prostration resulting in Young's death was due to natural causes; that Young's death did not result from violence nor from the resultant effects of any violence; that his death cannot be said to have occurred in the course of employment because he died seven days after his last work, and that there is no claim that he was in the course of his employment at the time of his death.

Some cases are cited which seem in part to sustain in principle the contention made by counsel on behalf of the defendant, but there is a difference. There would have been no injury if the business had not existed. The heat and humidity, the corrugated sheet iron in the building, the tarred roof, the poor ventilation, and the dust and particles of matter in the air, all acting together caused the sickness that brought about the death of the decedent. A stronger man might have lived, but it is enough that the industry brought about this man's death. An accident is an event which proceeds from an unknown cause, or is an unusual effect of a known cause,

and, therefore, not expected. *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.,* 139 U. S. 79. An accident is "an event that takes place without one's foresight or expectation, and it may include an injury received by one in a common-law affray, where no fault on his part is shown." *Supreme Council Order of Chosen Friends v. Garrigus,* 104 Ind. 133. An accident is "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected." *Schneider v. Provident Life Ins. Co.,* 24 Wis. 28. "An accident is the happening of an event without the aid and the design of the person and which is unforeseen." *Paul v. Travelers Ins. Co.,* 112 N. Y. 472. "An accident is an event that takes place without one's foresight, or expectation; an undesigned, sudden, and unexpected event." Webster's New International Dictionary. An accident is "an unexpected event which happens as by chance, or which does not take place according to the usual course of things." *North American Life & Accident Ins. Co. v. Burroughs,* 69 Pa. St. 43.

In *Crowley's Case,* 223 Mass. 288, an employee was suffering with syphilis. While employed he suffered a shock which aggravated the disease and resulted in insanity. The court held it to be an accident. It was held: "Since the workmen's compensation act prescribes no standard of fitness to which the employee must conform, and compensation thereunder is not based on any implied warranty of perfect health or immunity from latent and unknown tendencies to disease, where the employee, after an injury received in the course of his employment, developed paralysis, paresis, and insanity, he was entitled to compensation, though previous to the injury, the disease had been present, but latent, and did not impair his ability to work, and was merely made active by the injury."

In *Dotzauer v. Strand Palace Hotel, Ltd.,* 3 B. W. C. C. (Eng.) 387, the court said: "The mere circumstance

that a particular man, in doing work arising out of and in the course of his employment, meets with an accident which a perfectly healthy man would not have met with, is no answer at all. He takes his disability with him, and it is none the less an accident on that account." In that case Dotzauer washed crocks and dishes for the Strand Palace Hotel, Ltd. He put his hands in hot water in which there was soft soap and caustic soda. His finger nails came off, and he was disabled four months and a half. The appellate court reversed the decision of the judge of the county court.

In *Manning v. Pomerene, ante,* p. 127, this court held that, as there was sufficient evidence to support the finding of the district court that the disability was caused by an accident, its judgment would not be set aside. In *Miller v. Morris & Co., ante,* p. 169, the same doctrine was announced.

The finding of the district court is to the effect that the plaintiff is entitled to $5 a week compensation for 350 weeks beginning October 9, 1915, with interest at 7 per cent. per annum from the time the payments became due, together with $100 and interest for funeral expenses. There was judgment accordingly. It is our view that compensation is a charge against the industry because the industry itself is responsible for the injury. As applied to this case, it may be fairly assumed that plaintiff's decedent would not have died at the time he did but for the fact that he went to the factory on a hot day and worked in a heated building. Held the death was an accident in the sense that it was unexpected, and it was not such a result as would naturally follow the employment, but grew out of it, and the decedent died because of it.

The judgment of the district court is

AFFIRMED.

ROSE and CORNISH, JJ., not sitting.

SEDGWICK, J., concurs in the conclusion.

MATHILDA KANSCHEIT, ADMINISTRATRIX, APPELLEE, V. GARRETT LAUNDRY COMPANY ET AL., APPELLANTS.

FILED OCTOBER 13, 1917. NO. 20125.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: ACCIDENT. The evidence examined, and found to support the judgment of the district court, and to show that an accident happened to the deceased such as is described in section 3693, Rev. St. 1913.
2. **Appeal:** CONFLICTING EVIDENCE. Where there is a conflict in the evidence as to whether the disability of the plaintiff's decedent was caused by accident, the finding and judgment of the district court will not be disturbed unless clearly wrong.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

John G. Kuhn, for appellants.

Benjamin S. Baker and *A. B. Jaquith, contra.*

HAMER, J.

This action was brought in the district court for Douglas county under the employers' liability act (Laws 1913, ch. 198) to recover compensation because of the death of plaintiff's decedent, Charles F. Kanscheit. The trial court found that the death of the decedent was due to an accident.

The attending physician, Dr. Porter, saw the deceased very shortly after he suffered a heat stroke. He had known Mr. Kanscheit for about ten years. He knew his physical condition and his habits. He testified that the cause of his death was heat stroke. He defined heat stroke as the result of excessive heat, and that it caused the paralysis of certain centers controlling the organization of the body. The immediate cause of his decease he said was respiratory death; that it was caused by paralysis of the center of respiration. He testified that the deceased lived about an hour after he went to see him; that he took his pulse and his respiration and his tempera-

ture; that he saw no evidence of intoxication; that there was nothing to indicate it. When asked if overheat was a disease or an accident, he said he would call it an accident. He thought that the heat rays that caused the death might be external violence.

Dr. George A. Young testified that one has a heat stroke when it is hot and where there is artificial heat such as is found in a laundry. He gave it as his opinion that the death was caused by accident. He testified that heat stroke is generally recognized as an accident. He testified an accident to be an occurrence which happens suddenly and coming apparently from some outside agency; that it produces some pathological change in the body. There was a judgment for the plaintiff in the sum of $10 a week for 350 weeks, and for $100 as compensation for the expenses of the burial of the deceased.

It is contended that the deceased did not die because of any accident, and that he died of intoxication, and that his death was not due to anything within the course of his employment, but that it was due to disease, whether it was heat prostration or whatever it might have been. The evidence showed that he had been in the employ of the laundry company for about 15 years. The appellant claims that the death of the deceased was not due to an accident as defined by the employers' liability act; that the court erred in holding that the prostration and death was not due to a disease; and also erred in holding that the cause of the death arose out of and in the course of the deceased's employment. It was also claimed that there was error because the court failed to hold that the deceased was not in a state of intoxication at the time of his prostration and death. Section 3693, Rev. St. 1913, is quoted by counsel for appellant, and it is contended that the statute does not cover workmen, except while they are engaged in or about the premises where their duties are being performed, or where their service requires their presence as a part of such services at the time of the injury and during the hours of service as such workmen. Several doctors appear to have testi-

fied. There seems to have been little controversy about the fact that death was unexpected. There was testimony tending to show that the malady which caused the death of the deceased did not come suddenly and with violence, but that it was incubating prior to the date of his death, and that he complained for several days of not feeling well and being sick. It is strenuously contended that there was no evidence of an accident as an accident is usually understood. There was a strong effort made to show that the testimony of those witnesses who said that the death was due to heat stroke was probably wrong, and that the symptoms of certain other diseases were very similar to heat stroke.

The trial judge saw these witnesses as they testified and had an opportunity to judge of the credibility of the evidence which was offered. An examination of the evidence shows that there was some conflict. It was for the court to pass upon this testimony.

In *Manning v. Pomerene, ante,* p. 127, we held that the judgment of the district court in favor of the plaintiff and against the employer should be sustained, and also held that the injury received was due to an accident. It was also held that such an accident had happened as was described in section 3693, Rev. St. 1913; and that where there was a conflict as to whether the disability of the plaintiff's decedent was caused by the accident, and there was sufficient testimony to that effect, the finding of the district court would not be disturbed. That the finding and judgment of the district court would not be disturbed unless it was clearly wrong was held in *Miller v. Morris & Co., ante,* p. 169.

In view of the statute and the decisions referred to, we do not see our way clear to set aside the finding and judgment of the district court. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

JOHN EVERSON, APPELLANT, V. IVA M. EVERSON, APPELLEE.

FILED OCTOBER 13, 1917. No. 19230.

Divorce: DECREE: VACATION: FINAL ORDER. An order made by the trial judge in divorce proceedings after the term when a divorce decree was entered, but within six months of its date, sustaining a motion asking the vacation of the decree because of mistake and inadvertence, and because of alleged fraud and deceit upon the part of the plaintiff, is not a final order, and is within the jurisdiction of the court.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Appeal dismissed.*

Bernard McNeny, J. G. Thompson and *Flansburg & Flansburg,* for appellant.

O. E. Shelburn and *L. H. Blackledge, contra.*

CORNISH, J.

On August 5, 1914, plaintiff (appellant) obtained a decree of divorce. At the second term of the court thereafter, but within six months, the trial judge, on motion of the defendant stating that the judgment had been obtained by mistake and inadvertence on her part and by fraud and deceit upon the part of plaintiff, vacated the judgment and gave defendant leave to answer. Had the court jurisdiction to make the order, and is it a final order reviewable as such in this court? The question involves the construction of section 1606, Rev. St. 1913 (enacted in 1909), which reads as follows:

"A decree of divorce shall not become final or operative until six months after trial and decision except for the purpose of review by proceedings in error or by appeal and for such purposes only, the decree shall be treated as a final order as soon as rendered: Provided, if proceedings in error or by appeal shall have been instituted within said six months, such decree shall not become final until such proceedings are finally determined. If no such proceedings have been instituted, the district court

may, at any time within said six months, vacate or modify its decree, but if such decree shall not have been vacated or modified, unless proceedings are then pending with that end in view, the original decree shall at the expiration of six months become final without any further action of the court."

The legislative intent was to prevent certain practices which it was thought were becoming scandalous to the state. Divorced persons would go into a neighboring state and marry again within the six months' time allowed for appeal. The divorce decree being final, the state had no adequate preventive ready, and serious results to individuals sometimes followed. It was thought that the law would tend to prevent collusive and illegal divorces and illegal marriages. It sought to make more likely the re-establishment of the home and less likely the taking advantage of the state or the injured party who may have been misled or overreached. A penal provision, making such remarriage punishable as bigamy, was repealed at the time.

The trial courts, we believe, have generally construed the law to mean that during the six months' period the action is still pending before the court; that the trial court has power over it similar to that which trial courts have always exercised over their judgments during the term; that it is not a final order in any sense except for the purposes of appeal, but more in the nature of an interlocutory order which the court can, at any time, for good reason, vacate or modify. We are of the opinion that this construction is consistent with the language of the statute, and that the enactment is within the legislative power fixed by the Constitution. It follows that the court's order upon the motion was one which the court had jurisdiction to make, and was not a final order from which appeal can be taken.

At the hearing on the motion it was contended by plaintiff that the motion should be overruled, among other reasons because the defendant, having notice of the trial, made no appearance, and because afterwards she

recognized the decree, procured its modification, and in other ways acquiesced in the decree. To what extent such acts upon her part would operate as an estoppel against her to prevent a vacation of the decree is not decided. No doubt the general rule is that parties to a lawsuit are not permitted to take inconsistent positions or positions which merely tend to harass and annoy or mislead their adversary. We do not at this time decide whether the court's order was erroneous.

For the reasons above given, the appeal is dismissed and the cause remanded for further proceedings according to law.

DISMISSED.

HAMER, J., dissenting.

While I am not quite sure of my position, yet I am quite clear that the majority opinion is wrong. I dissent because the record, as I understand it, fails to show the right of this court to make the order dismissing the appeal.

The petition filed August 5, 1914, alleged the marriage of the plaintiff and defendant at Augusta, Maine, August 25, 1894, and their residence since that time at Alma, Nebraska; that, while the plaintiff had conducted himself toward the defendant as a faithful and considerate husband, the defendant, beginning about three years after said marriage, had been guilty of extreme cruelty toward the plaintiff, continuing, with slight variations, up to the time of filing the petition; that such cruelty consisted at times of physical violence, which is accurately described, but the defendant appears to have frequently alluded to the plaintiff as a person of low and vulgar ideals, and she would call him an ignorant foreigner, and would refer to his family in derogatory terms; that the homestead stood in the name of the defendant, and she would order the plaintiff to get out of the way and leave; that she would say to the plaintiff to get his divorce and get out of her house and to stay out of it; that she habitually nagged the plaintiff and belittled him; that she would absent herself from the home for long periods of time;

that when she was at home she gave frequent exhibitions of ungovernable temper without cause and made the home life of the plaintiff intolerable.

The journal shows that the cause came on for trial on the 9th day of November, 1914; that the case was heard before the court, and that the plaintiff was present, but "the defendant came not and her default is taken." After hearing all the evidence in the case, the court rendered a decree November 9, 1914, in which it found that there had been due service of summons; that the defendant had made default; that "the court finds generally for the plaintiff." The court "adjudged and decreed * * * that the marriage relation heretofore existing between the parties hereto be, and the same hereby is, set aside and annulled, and the parties are released from the obligations of the same." The decree provided that the "defendant be restored to her maiden name, Iva M. Haskell."

The record shows that on the 18th of November, 1914, the November, 1914, term of said court, at which the judgment was rendered, adjourned *sine die*. December 16, 1914, the defendant, Iva M. Everson, by her attorney, O. E. Shelburn, filed a motion to modify the decree. If the allegations in the petition were true, and the decree found them to be true, it might be expected that she would want the decree set aside or in some way modified so that it did not appear that she had done the violent things to her husband charged in the petition, and that she had not said the unkind things to him charged against her. The decree found the allegations of the petition to be true. The defendant had counsel and it was his duty to advise her of her rights. Presumably he did so. There is no claim that he did not. The motion filed "requests that she be allowed to retain her name of Iva M. Everson." The plaintiff consented to the request. The order modifying the decree reads: "The court being fully advised in the premises finds that said decree should be modified by striking out that part of the decree which re-

stores to the defendant her maiden name of Iva M. Haskell." This left her with the name of Iva M. Everson.

The next step appears to have been taken on January 13, 1915, and was taken at "the December, 1914, term of said court." The decree was taken November 18, 1914, and the court adjourned *sine die*. On the 16th day of December, 1914, the above motion to modify the decree was filed. She was then advised of the contents of the decree. If she consented to leave the decree stand except as to the matter of changing her name, she must be bound by what she did, and she must be deemed to have acquiesced in the decree as it then stood. She left the decree with herself adjudged as guilty of extreme cruelty charged against her. The specific acts of violence charged against her and her cruel language were not in any way questioned or denied.

But with this record standing as true she went into court on the 19th day of March, 1915, and filed a new motion. She then said that she "in good faith believed the plaintiff would abandon said claimed cause of action and would not further proceed with the matter." Her default had already been taken and judgment had been rendered against her establishing the allegations of the petition to be true, and she had acquiesced in the judgment when she had it modified. Is her contention reasonable?

John Everson made what he called a special appearance to this last application. He gave the following as reasons why the motion should not be granted: "(1) Final judgment was entered in said action on personal service on November 9, 1914, at a regular term of this court, which term adjourned without day on November 18, 1914. (2) Defendant at the regular December, 1914, term of this court requested and obtained a modification of said decree, with written consent of plaintiff, and said December term adjourned without day on January 13, 1915. (3) Said judgment and final orders of this court are in full force and effect, no appeal has been

taken therefrom, and this court is without jurisdiction in the premises."

On the 6th day of May, 1915, the cause came on to be heard on the motion of the defendant to set aside the default and the decree against her, and that she be allowed to answer and defend, and on that same day the term adjourned without day. On May 28, 1915, the plaintiff filed in the office of the clerk of said court a notice of appeal "from the order and judgment of the district court made in the above entitled cause on April 1, 1915, overruling a special appearance herein, and also from the order and judgment of said court made in said action on May 6, 1915, where the decree entered on November 9, 1914, was attempted to be set aside on motion of defendant."

There is in addition to the transcript the bill of exceptions, which contains no testimony taken at any trial. It consists only of an affidavit by Iva M. Everson, and another affidavit by John Everson. This is the bill of exceptions "at the hearing of the motion of the defendant to set aside the decree of divorce in the above entitled cause."

It is my view that, after the court had made this first modification and had put the name of Iva M. Everson in the decree, then the decree stood as the final action of the court, and that nothing else could be done without commencing a case against John Everson in the regular way. There was no new petition and no new summons, and therefore there was no jurisdiction.

Section 1606, Rev. St. 1913 (enacted in 1909) provides: "A decree of divorce shall not become final or operative until six months after trial and decision except for the purpose of review by proceedings in error or by appeal and for such purposes only, the decree shall be treated as a final order as soon as rendered: Provided," etc. By the section the decree becomes final for the purposes of review "as soon as rendered." When the case was tried the evidence was not preserved in a bill of exceptions. The bill of exceptions we have here contains two affi-

davits and is on the hearing of the special appearance and motion to dismiss the appeal. This court by a dismissal of the case would seem to leave the plaintiff without a remedy. There should have been a trial in the district court if the case was still alive in it. If the case was not alive nothing remained to be done. The trouble arises because one class of decrees is to be considered and treated entirely in a different manner from every other class of decrees. Section 1606, Rev. St. 1913, does not repeal the original provisions with regard to vacating judgments after the term. It follows that they are still in force.

In *Schafer v. Schafer,* 71 Neb. 708, this court said: "It is probably true that parties may marry again after six months from the date of the decree, if no error or appeal proceedings have been commenced; but there is no doubt that in so doing they must take their chances on having the decree vacated upon a proper application under the provisions of section 602 (Rev. St. 1913, sec. 8207). * * * Repeals by implication are not favored, and a construction which results in an implied repeal of some other enactment should only be resorted to when made necessary by the evident intent of the legislature."

It is apparent from the foregoing language that this court considers that section 602 of the Code is still in force, and that it has not been repealed.

The property in this case appears to have been divided according to the satisfaction of the parties. As the record showed that the defendant had procured the modification of the decree according to her liking, I am unable to understand why the judgment should be set aside and the appeal dismissed. I think it error of this court to set aside the judgment when there was no evidence before the district court which tended to show a different state of facts from those contained in the decree. The violence of the defendant toward the plaintiff and her cruel and abusive remarks to him were not denied by her. She comes before the court adjudged to be guilty and pro-

duces no evidence to set its judgment aside. It was error to dismiss the appeal.

The affidavit of John Everson tells a story which should be studied by every member of this court. It tells of devotion to the interests of the defendant and an untiring industry by the plaintiff on behalf of the defendant and her uncle, William Gaslin. It tells how John Everson made them prosperous and rich while he himself suffered in silence and alone. The record shows that the defendant never wanted John Everson until she wanted to punish the other woman.

J. B. BATES ET AL., APPELLEES, V. JOHN DWINELL, APPELLANT.

FILED OCTOBER 13, 1917. No. 19494.

Statute of Frauds: SALES: PAYMENT BY CHECK. In the absence of proof that a check given to the seller by the purchaser was given under agreement that it should constitute payment or part payment of the price, rather than the means of payment, the check (neither paid nor presented for payment, but tendered back to the maker the day after) was not such payment as to take the sale out of the statute of frauds.

APPEAL from the district court for Knox county: ANSON A. WELCH, Judge. *Reversed.*

Fawcett & Mockett, Richard Steele and *W. A. Meserve,* for appellant.

Fred H. Free and *J. W. Blezek, contra.*

CORNISH, J.

This is an action for damages for refusal to deliver cattle purchased by plaintiffs from defendant. Plaintiffs recover. Defendant appeals.

The question is whether the check for $5,000 on the Knox County Bank, given by plaintiffs to defendant for the cattle, constitutes payment so as to take the tran-

saction out of the statute of frauds; the defendant disputing the correctness of its amount, having, the morning after receiving it, tendered the check back to plaintiffs without having presented it to the bank for payment, and the contract being oral. The statute is in its nature technical. To serve its purpose the payment must be absolute. The courts have generally regarded such use of a check as a means to payment; as taken in lieu of cash temporarily for convenience, not amounting to payment until cash is received upon it; or, as it might be stated, it is a mode of making a cash payment, and not the giving or accepting of a security. Such holding, we believe, reflects the facts of the transaction. Of course, if a check were taken under an agreement that it should constitute payment and discharge the debt, so that the creditor would hold it at his own risk, as respects the money in the bank, the case would be different.

The evidence shows that the maker of the check had only $1,500 in the bank at the time. This being true, the check did not assign the $1,500. If the $3,500 additional was to be advanced in the nature of a loan, it would be a loan in excess of the amount permitted by the banking law to a bank of this bank's capital, $10,000. The cashier swore that the check would have been paid if presented. It is doubtful if the court will presume that the bank would have paid the check according to the cashier's promise, but rather that the bank would have refused payment, according to law.

For cases bearing upon the question considered, see *Groomer v. McMillan,* 143 Mo. App. 612; *Hessberg v. Welsh,* 147 N. Y. Supp. 44; *McLure v. Sherman,* 70 Fed. 190; 22 Am. & Eng. Ency. Law (2d ed.) 569; 29 Am. & Eng. Ency. Law (2d ed.) 970.

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., not sitting.

HAMER, J., dissenting.

I am quite unable to agree with the views expressed in the majority opinion. It treats the check as if it did not constitute a payment. The defendant accepted it at the time it was delivered to him, and the fact that he subsequently undertook to return it, and dropped it at the feet of the man from whom he received it, does not do away with the acceptance in the first instance. The check was received as payment for 64 cattle sold by the defendant, John Dwinell, to the plaintiffs Bates and Jiracek. No objection was made to the check. It was delivered by agreement as full payment. The petition alleges that Dwinell was the owner and in possession of the cattle in Knox county, Nebraska, and that the defendant offered to sell the cattle to the plaintiffs at the lump sum of $5,000, that the offer was accepted, and that the plaintiffs paid the defendant the said sum of $5,000 in the form of a bank check drawn by the plaintiffs in favor of the defendant upon the Knox County Bank of Verdigre, Nebraska. There is also the further statement that the plaintiffs purchased the cattle for shipment, and that the cattle were reasonably worth $5,750. It is claimed that the plaintiffs' loss in profits was $600 by reason of the fact that the defendant refused to deliver the cattle. The answer is a general denial. The evidence shows that there was a refusal to deliver the cattle. At the time the check was returned it had not been presented. No one could say that it would not be paid, and the cashier of the bank testified that if the check had been presented the bank would have paid it. The contention of the defendant is that the contract for the sale of the cattle was not in writing and subscribed by the party to be charged thereby. To my mind the facts seem to show that the defendant concluded to "back out," and that he went over to Jiracek's, and told him that there was a mistake in figuring the cattle and threw the check down at Jiracek's feet. To any one familiar with this sort of transaction the case is the plainest sort of "back out." The judgment of the

district court should have been affirmed by this court.

I examined the cases cited in the majority opinion. As I understand them they do not apply, except the first case cited, *Groomer v. McMillan,* 143 Mo. App. 612. In *Hessberg v. Welsh,* 147 N. Y. Supp. 44, the payment of the check was stopped. Of course, in such a case as that, giving the check did not pay the debt. In *McIure v. Sherman,* 70 Fed. 190, it was held: "A check drawn upon a deposit in the bank named as drawee has a money value, and is a sufficient part payment of the price, upon a sale of personal property, within the statute of frauds." It will be seen that this case is in conflict with the majority opinion. In 22 Am. & Eng. Ency. Law (2d ed.) 569, it is said: "In case the check is not honored upon due presentation the original indebtedness for which it was given continues to exist." That is undoubtedly true.

In section 312, Rev. St. 1913, there is a provision limiting the power of a single corporation transacting a banking business to make a loan to any one party exceeding 20 per cent. of its paid-up capital and surplus. But in the same section it is said: "But the discounting of bills of exchange, drawn in good faith, against actually existing values, and the discounting of commercial paper actually owned by the persons negotiating the same, shall not be considered as money borrowed." It will be seen that this provision permits a credit outside of the 20 per cent. of paid-up capital. It permits such credit when it is obtained against actually existing values. There was nothing to prevent the bank from using the credit obtained by reason of the cattle. The cattle could have been shipped to market in the name of the bank, or the plaintiffs could have extended their credit in the bank by drawing on their salesman at Omaha, or on the packers to whom he might sell them. It does not follow that the bank intended to do any thing unlawful, or that the check would not have been paid.

In *Brown v. Wade,* 42 Ia. 647, it was said: "It seems to us there can be no question that the facts stated in this branch of the instruction amount to a delivery and

acceptance of the cattle. What constitutes a delivery depends largely upon the character and situation of the property. The delivery of a key of a warehouse, or making an entry in the books of a warehouse-keeper, or delivering with indorsement a bill of lading or a receipt, constitutes such delivery of personal property as will satisfy the statute of frauds."

In *Cowing v. Altman,* 5 Hun (N. Y.) 556: "One H., at the request of several of the creditors of a bankrupt, consented to act as assignee, on condition that they would pay to him the sum of $2,000 in addition to his legal fees. Subsequently the defendant bought up the claims against the bankrupt, agreeing with the creditors to pay the said sum to H., and in pursuance of this agreement he subsequently gave a check for that amount, upon which this action was brought. Held, that the agreements were illegal, under section 45 of the bankrupt act, and that as they were still unexecuted, this court would not enforce them." Subsequently this case was reversed in *Cowing v. Altman,* 71 N. Y. 435, where it was held that the check "would be valid in the hands of a *bona fide* holder for value, who took it before it was dis honored, without notice of the illegality."

Dwinell took the check. He agreed with the purchasers that they might come in the morning and get the cattle. Dwinell had agreed to feed the cattle the same as they had been fed. Was he not the agent of the purchasers for that purpose? The jury had the witnesses before them. They had an opportunity to judge of the fact as to whether Dwinell told the truth. They decided against him. What business have we to upset the verdict of the jury? We cannot do so unless it was clearly wrong. *Blado v. Draper,* 89 Neb. 787; *Boyd v. Lincoln & N. W. R. Co.,* 89 Neb. 840; *Goos v. Chicago, B. & Q. R. Co.,* 84 Neb. 651; *Sheridan Coal Co. v. Hull Co.,* 87 Neb. 117; *Bell v. Stedman,* 88 Neb. 625.

Where the evidence is conflicting it is the province of the jury to decide questions of fact, and a reviewing court cannot interfere. *Jacobs v. Goodrich,* 90 Neb. 478.

The claim is made that the cattle were worth $84 a head. There were 64 cattle. If one animal costs $84, it follows that 64 head at that price were worth 64 times as much, which would be $5,376. The claim is made that defendant thought the cattle would come to even $5,000. When did multiplying 4 by 4 produce 0? No wonder the jury found as they did in the face of such testimony as this. The facts show that there was a lump sum agreed upon. The verdict of the jury establishes their finding against Dwinell.

When a check is given to a person in the ordinary course of business it is of such value that the person who receives it cannot look to the drawer of the check for the amount named therein until he has presented the check to the drawee or payee for payment, and payment has been refused. *Murray v. Judah*, 6 Cow. (N. Y.) *484; *Cowing v. Altman*, 71 N. Y. 435; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425; *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5. "Under the authorities, I think a check, such as those described in this case, must be considered to have a money value. It is certain they would be so considered by those dealing in such securities." *McLure v. Sherman*, 70 Fed. 190.

THOMAS MERKOURAS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED OCTOBER 13, 1917. No. 19611.

1. **Negligence:** CARE REQUIRED. One should in his movements exercise ordinary care for the safety of others, but in doing so he has a right to assume that others will govern their movements as ordinary persons do in exercising care for their own safety. Only those dangers and perils reasonably to be anticipated have to be provided against.

2. **Master and Servant:** INJURY TO SERVANT: CONTRIBUTORY NEGLIGENCE. A railroad company, in ordering the movements of its cars, would not anticipate that two men would engage in scuffling

upon its track, especially so when the men were its employees, working in its switch-yards and momentarily expecting the approach of cars.

3. ———: ———: DUTY OF MASTER. A railroad company does not owe its employees, engaged in its yards in which engines are constantly moving, the duty of keeping a constant lookout to warn them of dangers of which they already have knowledge.

4. ———: RULE GOVERNING SERVICE: CONSTRUCTION. A rule of a railroad company, susceptible of two constructions but which has never by the railroad company been given the construction contended for by the party asserting it, which is contrary to the custom always followed, and which rule was not relied upon by the party, will not be given such construction by the courts.

5. **Trial:** WITNESSES: EXAMINATION: IMPROPER ARGUMENT. A party surprised by the testimony of a witness, whom he has called, may in the discretion of the court be allowed to interrogate him with respect to previous inconsistent statements for the purpose of probing his recollection and to give him an opportunity to correct his mistake, if he has made one, and also to show, so far as may be, the circumstances which induced the party to call the witness. He is not permitted, however, to prove contradictory statements of his own witness and discredit him, and it is improper for counsel in argument to go outside the evidence and assert, as of his own knowledge, contradictory statements of the witness.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

Byron Clark, Jesse L. Root, J. B. Strode and *Strode & Beghtol,* for appellant.

Wilmer B. Comstock, contra.

CORNISH, J.

Action for damages for loss of part of foot, caused by defendant's negligence. Plaintiff recovered, and defendant appeals.

At the time of the accident plaintiff, with others, was engaged as an employee of defendant in its yards at Lincoln in putting ice in refrigerator cars. A switch-track of defendant ran along an elevated platform connected with an ice-house, so that ice could be put from it into the top of the car. A ladder led from the ground

to the platform. Two empty cars, designated as "rubbish cars," were on the track in front of the ice-house, waiting to be moved onto a place farther up the track in the yards where they were to be filled with refuse. It was after the close of the noon hour. The men had been at work in the morning, and were idle, waiting for more refrigerator cars to be moved in place for filling. While waiting, plaintiff and another employee became engaged in wrestling, and in their movements got on the track in front of the rubbish cars in the direction in which they were to be moved, both men being on the ground. There is conflict in the testimony as to how they came to be upon the track in this position. Plaintiff's testimony is that it was not voluntary upon his part; that the other employee, Johnson, had been trying to "joke and play with me;" that Johnson jumped on his back and brought him down against his will. He did not know, but thought they might have been in this position 20 minutes before the accident. While they were in this position a string of 12 refrigerator cars, for which they were waiting, was backed up, it being intended first to move the rubbish cars to their proper place and finally leave the refrigerator cars also in place. When the brakeman on the approaching cars, which had reached the two rubbish cars, had made the coupling, he climbed on the rubbish car, intending to go to the front end of the string of cars as they were moving forward. When he heard the alarm from others that plaintiff was in the precarious position, he at once gave the engineer the stop sign. The engineer stopped the moving cars, but too late to prevent the injury.

Plaintiff contends that defendant failed to exercise ordinary care for his safety, in failing to ascertain that he was on the track at the time; in failing to give warning of the approach of its cars; in failing to stop the string of cars within a reasonable time after learning of plaintiff's situation; and in failing to have someone at the front end of the string of cars as they were moving forward. The evidence does not show that any failure

on the engineer's part to ring a bell or blow a whistle caused the accident, even though such failure would have been negligence. Nor does the evidence show that the brakeman, after discovering the situation of the plaintiff, was negligent in giving the stop sign to the engineer. The brakeman, as he approached the rubbish cars for the purpose of making the coupling, and paying attention to the moving cars, would not see the men at the other end, and no doubt, upon hearing the alarm, at once gave the stop sign to the engineer to stop the cars.

The question turns on whether the defendant was negligent in failing to discover plaintiff's situation in time to have prevented the accident. A railroad track in use is a dangerous place anywhere, more dangerous in switch-yards where cars are being continually moved from place to place. One who would voluntarily lie down or place himself upon a railroad track when cars are expected to move over it would be guilty of gross negligence, and ordinarily, would blame himself only if accident resulted. The rule of negligence is one of ordinary care under the circumstances. One should in his movements exercise ordinary care for the safety of others, but in doing so he has a right to assume that others will govern their movements as ordinary persons do in exercising care for their own safety. In other words, only those dangers and perils reasonably to be anticipated have to be provided against. A railroad company, in ordering the movements of its cars, would not anticipate that two men would engage in scuffling upon its track, especially so when the men were its employees, working in its switch-yards and momentarily expecting the approach of cars. The fact that one of the men engaged in wrestling was not there by his consent, while it may bear upon the question of negligence upon his part, has no bearing upon the question of negligence on the part of the railway company.

The courts recognize the fact that a railroad yard, with numerous tracks connected by switches, where cars and engines are constantly moving, is essentially a place

of danger even in the day-time. *Hoffman v. Chicago & N. W. R. Co.*, 91 Neb. 783; *Jones, Adm'r, v. Virginian R. Co.*, 74 W. Va. 666, L. R. A. 1915C, 428; *Norfolk & W. R. Co. v. Belcher's Adm'x*, 107 Va. 340; *Chicago, R. I. & P. R. Co. v. McIntire*, 29 Okla. 797. In *Hoffman v. Chicago & N. W. R. Co., supra*, where an employee, a brakeman, was rightfully on the track, crossing it on his way home from work, we held: "In an action against a railroad company for causing the death of a brakeman by backing a car against him in the night-time, evidence that there was no light on the car, that there was no brakeman thereon, and that it was moved without notice or warning," was insufficient, in the absence of a custom requiring such notice or warning, to prove actionable negligence, the brakeman being familiar with the switch-yards. In the instant case the plaintiff had been engaged in this employment for 11 days preceding the injury. It was in the day-time, and, as above stated, the employees were waiting for the cars. While there is evidence that when at work the employees might occasionally get on the track to pick up ice or remove rubbish, it shows that there was no occasion for them to do so at this time. They would not be expected to be there and were not there for any such purpose. The plaintiff's testimony is that he did not get within five feet of the track until Johnson jumped on his back. If these men had been on the track in any ordinary way reasonably to be anticipated, whether engaged in their work or not, upon hearing the cars approaching, as plaintiff swears he did, they would have had ample time to get off the track before the cars, going at about two miles an hour, reached them. Of course, if there had been a man stationed at the front end of the two rubbish cars, the accident would not have occurred. If the only occasion for stationing a flagman at such place would be to prevent accident to persons lying down or scuffling upon the track, it would be unreasonable to require it. Persons in switch-yards are expected to be on constant look-

out for moving cars. If, however, there were such a rule and custom, negligence in a proper case could be predicated upon failure to observe it. In such case, where the allegations of negligence are specific, the rule, the plaintiff's reliance upon it, and the defendant's failure to observe it should be pleaded as negligence, unless the rule is expected to be used merely as an admission. No such rule or custom was pleaded in this case.

It is contended by plaintiff that there was such a rule. In defendant's book of instruction to employees, under the head, "Movement of Trains," rule 102 reads as follows: "When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need." This evidence was admitted over defendant's objection. The parties dispute the meaning of this rule. Defendant contends that it refers only to the movement of trains, and that the string of cars in question did not constitute a train; that trains are distinguished by a flag at the rear displaying a marker. Plaintiff argues that, if they were not shifting trains or making up trains, it must come within the rule. It is answered that you do not shift trains but cars. There is room for different constructions of the rule. The evidence is uncontradicted, however, that the rule had never been interpreted as plaintiff contends; nor had there ever been a custom of stationing flagmen at the front in such movements of cars in the yards as the one in hand. This being the case, the question—what is the right interpretation of the rule—makes no difference. A rule which has never been observed or relied upon is the same as one abrogated. 1 Elliott, Railroads (2d ed.) sec. 202a; 3 Elliott, Railroads (2d ed.) sec. 1282; 3 Labatt, Master and Servant (2d ed.) secs. 1138, 1139.

We are of opinion that no negligence, based upon custom or rule of the defendant company to have a flagman stationed at the front end of the approaching string of cars, was shown in this case. Nor does the evidence

show the defendant negligent in failing to observe the rule invoked by plaintiff as laid down in *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645, that a railroad company "is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way," for the reason that at the time of the accident the plaintiff was neither known to be, nor could reasonably be expected to be, in the situation in which he was.

In *Bryant v. Beebe & Runyan Furniture Co.,* 78 Neb. 155, where employees knew of a defect in a machine which caused the injury, yet voluntarily placed themselves in a position of peril with respect thereto, we held: "To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural or probable consequence thereof, and that it ought to have been foreseen in the light of attending circumstances."

"It is within the discretion of the trial judge to allow counsel to ask a witness called by him, who takes him by surprise by his testimony, whether the witness had not at a prior time made a statement to him contradictory of or inconsistent therewith." *Cady Lumber Co. v. Wilson Steam Boiler Co.,* 80 Neb. 607. This is permitted, to probe the witness's recollection, and show the circumstances which induced the party to call him. The party, however, is not permitted to prove his contradictory statements by other witnesses; otherwise, parties might call a witness merely for the purpose of getting in his contradictory statement. In the instant case, the plaintiff was permitted to put these questions to the witness Johnson. Afterwards plaintiff sought to impeach the witness by testimony of the plaintiff to show contradictory statements. The evidence was afterwards stricken out. In his argument to the jury, counsel for plaintiff made statements as of his own knowledge, which, if true, were impeaching and directly contrary to the statements made by the witness. This was improper conduct. The

court sustained objection to the remarks of counsel, but did not caution the jury to disregard the remarks made. This caution should have been given.

For the reasons given in this opinion, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

ROSE, J., dissents.

MORRISSEY, C. J., dissenting.

Plaintiff recovered a judgment for $2,500 for the loss of part of his foot. He was an employee of defendant and was properly on its right of way. It is alleged, and I think shown to a reasonable certainty, that he sustained his injury because defendant in disregard of its own rules failed to keep a man as a lookout on the front of the cars it was switching. Had defendant observed its own rules the injury would not have been inflicted.

The jury, after being properly instructed, resolved all the disputed questions in favor of plaintiff, and I therefore dissent from the majority opinion.

GEORGE DE GRAW, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED OCTOBER 13, 1917. No. 19254.

1. **Railroads:** INCLOSURE OF RIGHT OF WAY. Sections 6035, 6036, Rev. St. 1913, construed, and *held* that railroads are thereby required to erect and maintain suitable and amply sufficient fences and cattle-guards on the right of way of each road to prevent live stock from entering thereon, except at public crossings, and also to effect a complete inclousure of the track, except in cities, towns, villages, and necessary shipping stations, and also except in such proximity to switches as would imperil the lives of employees.

2. ———: INJURY TO ANIMALS: QUESTION FOR JURY. The record examined, and *held* that the question of plaintiff's claim for damages for cattle killed by defendant's train should have been submitted to the jury.

3. ———: INCLOSURE OF RIGHT OF WAY. "A railroad company is not required to inclose that portion of its right of way, even outside of towns, villages, and cities, and public highways, the inclosure of which by the construction of fences and cattle-guards would be an increased danger to human life." *Burnham v. Chicago, B. & Q. R. Co.*, 83 Neb. 183.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Reversed.*

K. W. McDonald, for appellant.

E. E. Whitted, Wright & Mothersead and *T. M. Stuart, contra.*

DEAN, J.

Plaintiff commenced this action against defendant to recover $512, the alleged value of 7 head of cattle owned by him that were killed by one of defendant's trains on its right of way. At the conclusion of the testimony the court directed the jury to return a verdict for defendant. From a judgment rendered thereon, plaintiff appeals.

The cattle that were killed, with 16 other head belonging to plaintiff gained access to defendant's right of way within the unincorporated village of Northport at a point where there were cattle-guards and wing-fences, but which were in so dilapidated a condition as to be useless for the purpose of turning stock. It appears from the testimony of the trainmaster that the cattle-guards at this particular point, and over which plaintiff's cattle entered upon the right of way, were a menace to the safety of trainmen and employees in switching and handling trains. In such case defendant was therefore absolved from the duty of maintaining cattle-guards at that place. *Burnham v. Chicago, B. & Q. R. Co.*, 83 Neb. 183. But that circumstance, significant as it is, does not decide the question before us, when we consider in all of its bearings the object and the purpose that must have

been in the legislative mind when the railroad fencing statutes were enacted. In the present case the cattle, after entering the right of way, went north thereon to the place where they were killed, which is about 1½ miles beyond defendant's switches and beyond a "Y" maintained by defendant.

Section 6035, Rev. St. 1913, provides, among other things, that the railroad company shall erect and maintain fences on both sides of the track "suitable and amply sufficient to prevent cattle, horses, sheep and hogs from getting on such railroad, except at the crossings of public roads and highways, and within the limits of towns, cities and villages."

In the absence of direct legislative expression this court has properly, as we believe, and for the best of reasons, construed the law in former decisions to mean that a railroad is not required to maintain fences or cattle-guards at any point, even outside of towns, villages and cities, where such inclosure would prevent proper access to station facilities or where it would increase the danger to the lives of its employees in handling its trains. The law has been properly so construed because, in view of the perils that are incident to trainmen in the train service and that are always attendant upon the switching and handling of trains, it is reasonable to believe that such, for humane reasons, was the legislative intent, and our interpretation seems properly to come within the purview of the law. *Chicago, B. & Q. R. Co. v. Sevcek*, 72 Neb. 793. On this point there is no longer controversy in this state. But neither the *Burnham* nor the *Sevcek* case applies to a situation where stock was killed, as in the present case, on the right of way, but perhaps a mile distant from a point where suitable cattle-guards could have been maintained that would not be a menace to the safety of employees, and more than a mile distant from the point of entry. It may also be observed that the public is concerned that the right of way be kept clear of herds of live stock. The violent impact of a rapidly moving train against a

herd of full-grown cattle roaming over the tracks or lying down between the rails is a situation laden with possibilities of peril to passenger and trainmen alike.

Section 6036, Rev. St. 1913, provides: "Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof against all live stock running at large at all points, shall be absolutely liable to the owner of any live stock injured, killed or destroyed by their agents, employees or engines."

The record before us discloses a situation where a railroad right of way, at best but a narrow lane, was inclosed on the sides only, and where the fences increased rather than diminished the danger to a herd of cattle thereon at a point a mile or more distant from an opening where they might escape. The spirit of the law, if not its very letter, requires a railroad to so fence and inclose its tracks, aside from the exceptions noted in section 6035, and also except at such points where the inclosure would endanger the lives of its employees, in such manner as to prevent stock from entering the right of way. It is clearly evident that such is the intent and ultimate purpose of the law.

In view of the record, it is not a strained construction of the law in question to hold that defendant has not complied with its provisions. The question of defendant's liability should therefore have been submitted to the jury. The judgment of the trial court is reversed for further proceedings in accordance with law.

REVERSED.

SEDGWICK, J., concurring.

The question presented in this case is an interesting one. The statute (Rev. St. 1913, sec. 6035) provides that the railroad company shall erect fences along the line of the track "suitable and amply sufficient to prevent cattle, horses, sheep and hogs from getting on such railroad." The same section says that these fences are not to be erected at crossings of public roads and highways,

and within the limits of towns, cities and villages. The statute, taken literally, does not make any exception where inclosing the right of way would endanger the lives of employees, and yet we have, and I think with great reason, considered that the legislature must have intended that.

The animals in this case were not injured at any place where it would endanger the lives of anybody to fence the track so as to keep them off. If we construe the statute so that the roads shall not be compelled to fence their track where by doing so they would endanger the lives of their employees, should we not also necessarily conclude that it was intended to require them to so fence their tracks as to prevent animals from going from these places where they are not required to fence onto the track where they are required to fence? Wherever a private way crosses the track suitable cattle-guards are required. The statute has been construed to intend that station grounds where private parties must pass from place to place in the transaction of the ordinary business of the road need not be fenced. These grounds are essentially a private way, and the statute clearly means that cattle-guards must be so placed as to prevent animals from going upon the tracks from such private way. If we construe the statute so literally as not to require the defendant to prevent animals from going upon the right of way from these private grounds of the company, we must with greater reason overrule our former decisions and apply the letter of the statute so as to require the company to either fence their private grounds or assume liability for damages to animals trespassing thereon.

It is plain that the intention of the people who made this law through their legislature is that animals shall not be allowed by the railroad company to run upon their main lines, and I think that the statute should be so construed as to enforce that provision. This would require that the railroad company be held liable in this case under the facts as represented in this record.

JAMES O'BRIEN, APPELLEE, V. SOUTH OMAHA LIVE STOCK EXCHANGE, APPELLANT.

FILED OCTOBER 13, 1917. No. 19532.

1. **Voluntary Associations:** ENFORCEMENT OF RULES: PROVINCE OF COURTS. Courts will not interfere with the enforcement of rules and by-laws of an unincorporated voluntary association or exchange, organized, not for pecuniary gain or profit, but to provide convenient facilities for the orderly conduct of business at the common expense, such rules being reasonable and uniform, and not in contravention of the law of the land, nor against public policy. In such case the association will be left free to enforce its rules and by-laws by such reasonable means as it may adopt for its government.
2. ———: MEMBERSHIP: AMENABILITY TO RULES. One who becomes a member of such association thereby voluntarily agrees to submit to its rules and is bound by their enforcement.
3. ———: ———: ANNULMENT. Where a member of such exchange, after a hearing, voluntarily pleads guilty to charges of bad faith and dishonesty in business dealings with shippers and patrons of the exchange, in violation of its rules, and where in pursuance of such plea he is expelled from membership, his certificate of membership is thereby automatically canceled.
4. ———: CHARGES AGAINST MEMBER: HEARING. In such case a hearing, conducted in pursuance of charges of bad faith and dishonesty preferred against a member of the association, is not to be tested by the strict rules of criminal pleading and practice, where the accused was notified in writing of the acts of bad faith and dishonesty complained of, and, being present, did not object, but consented to such hearing and pleaded guilty to such charges.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Brown, Baxter & Van Dusen, for appellant.

Lambert, Shotwell & Shotwell, contra.

DEAN, J.

James O'Brien was expelled from membership in the South Omaha Live Stock Exchange for bad faith and dishonest conduct, in violation of certain of its rules and

by-laws. The exchange is an unincorporated voluntary association of persons organized for the purpose of establishing and maintaining a commercial exchange, but not for pecuniary gain or profit. Among its professed objects are these: "To inculcate and enforce correct and high moral principles in the transaction of business; to inspire confidence in the methods and integrity of its members; * * * and, generally, to promote the welfare of the South Omaha market." An initiation fee of $1,000 was paid by Mr. O'Brien for a certificate of membership entitling him to the benefits and privileges of the exchange, the certificate by its recitals subjecting him to an observance of the rules and by-laws of the association. On August 17, 1914, after a hearing, he pleaded guilty before the board of directors to charges filed against him by the prosecuting committee of the association, wherein he was charged with "bad faith and dishonesty" in business transactions with several live stock shippers who were patrons of the exchange. In pursuance of his plea of guilty he was expelled from membership and his certificate of membership was canceled. He commenced this action against the exchange to recover $3,000, the alleged value of the certificate. The case was tried to the court without a jury. A judgment for $1,414 was recovered by him, from which the defendant exchange appealed.

Plaintiff contends that defendant unlawfully canceled his certificate of membership and thereby "forfeited and converted" his property to its own use. The state of the record demands an examination of the rules of the exchange. Section 7 of rule 11 provides that if any member shall "be guilty of any act of bad faith, or dishonest conduct, he shall be censured, fined, suspended, or expelled by the board of directors as they may determine from the nature and gravity of the offense committed." Section 10 of rule 11 provides: "An expelled member shall not be readmitted to membership except upon payment of the regular initiation fee and annual assess-

ment, and upon satisfactory evidence that he is a fit person for membership in the association."

In view of the professed objects of the exchange and of its rules and by-laws, it seems that the expulsion of plaintiff, based as it is on his admission of guilt of bad faith and dishonesty, automatically voided and annulled his certificate. It follows that all of the rights and privileges that were inherent in the certificate before expulsion then instantly ceased. The certificate from that moment was valueless in the hands of any person for any purpose. The cancelation of the certificate by the board, of which plaintiff complains, was therefore a formality both gratuitous and unnecessary.

Can human expression be more clearly and explicitly direct in meaning than the language cited from sections 7 and 10 of rule 11 of the by-laws? Can any reasonable inference be drawn therefrom other than that expulsion of a member for bad faith and dishonest conduct means the utter annulment of the certificate and every privilege that pertained thereto before expulsion? If the act of expulsion on that ground does not cancel the certificate for every purpose for which it was originally intended, no significance can then attach to this language that we find in rule 11: "An expelled member shall not be readmitted to membership except upon payment of the regular initiation fee and annual assessment."

If the rules can be held to contemplate that such certificate, after expulsion for bad faith and dishonest conduct, is of any value in the hands of any person, surely such person would be its former owner, the expelled member, who has repented and who seeks to return. But that is not the language of the rule nor its intent. In order to again become a member after expulsion he must again pay the required initiation fee and annual assessment. Plaintiff assented to this by-law upon assuming membership, and it then became an essential part of the contract between him and the exchange. And it was not an implied, but an express, agreement that lawful expulsion would cancel his certificate and every vestige of priv-

ilege in the exchange theretofore conferred by that instrument. *White v. Brownell,* 3 Abb. Pr. n. s. (N. Y.) 318.

In answer to the suggestion that the punishment of plaintiff for his confessed acts of dishonesty is excessive, it may be pointed out that sections 5 and 6 of rule 9 provide that the mere failure to pay certain assessments for 3 months works a cancelation of the membership certificate, and that "all rights incident thereto shall be taken to have been surrendered and shall thereupon revert to the exchange." It therefore appears that the rights and privileges pertaining to such certificate do not contemplate absolute ownership in the member, but a qualified ownership conditioned upon compliance with rules to which he assented when becoming a member.

A certificate of membership in an exchange is a species of property, but it cannot be bought outright, nor can it be separated from the conditions that the rules impose upon it. And it is those conditions that impart to it value. The rules of the exchange and the conditions of purchase of a certificate are inseparably incident to such certificate in the hands of whomsoever it may come. *Hyde v. Woods,* 94 U. S. 523; *Missouri Bottlers Ass'n v. Fennerty,* 81 Mo. App. 525.

The rules that apply to membership in associations that are organized for profit do not ordinarily apply to membership in voluntary unincorporated associations, organized not for pecuniary gain or profit. In the latter the association will be left free to enforce its rules and by-laws by such reasonable means as it may adopt for its government. This is because the association that is organized for profit deals as an organized entity with the public generally, while in the voluntary association organized not for pecuniary gain or profit the individual members deal with the public and one another. Hence it is imperative that in the business transactions of its membership the highest standards of commercial conduct be maintained. Failing in this the prime object of the exchange would be destroyed, and from this arises the

necessity for the adoption and enforcement of disciplinary rules.

A transcript of the proceedings before the board of directors, wherein plaintiff pleaded guilty to the charges against him, all duly certified by the notary public before whom they were taken, was offered in evidence by defendant, but excluded by the court upon plaintiff's objection. We believe the trial court should have admitted this record in evidence for the reason, among others, that one of plaintiff's contentions is that the proceedings before the board of directors were in some respects unlawful, and that his expulsion was therefore not justified. While the disciplinary proceedings in a voluntary association are quasi-judicial in character, courts do not ordinarily interfere except to discover whether such proceedings have been conducted in good faith and in pursuance of rules and by-laws that are not obnoxious to public policy nor to the law of the land. In a hearing before a voluntary association or exchange for violation of its rules by a member, it is not required that the procedure be tested by the rigid rules of criminal pleading and practice. We discover no substantial irregularities in the proceedings complained of. The tribunal was of plaintiff's own choosing. The hearing appears to have been fairly conducted. Plaintiff was given opportunity to controvert instead of entering a plea of guilty to the charges preferred against him. *Board of Trade v. Nelson,* 162 Ill. 431; *Lewis v. Wilson,* 121 N. Y. 284; *Ihnen v. South Omaha Live Stock Exchange, ante,* p. 195; *Otto v. Journeymen Tailors,* 75 Cal. 308, 7 Am. St. Rep. 156; *Belton v. Hatch,* 109 N. Y. 593.

Plaintiff contends that he was both fined and expelled for the same offense. An examination of the record shows some confusion on this point, but he was not fined. This contention arose from the fact that he with three other partners composed the "Big Four Commission Company," a concern doing business on the exchange, and against this partnership and its members a complaint was filed under another section of the by-laws by the prosecuting

committee for dishonest conduct in rendering separately to 11 shippers "account of sales showing different prices, different docks, and different weights than those shown by original settlements made with purchasers." After a hearing the company was fined $100 and expelled. Both cases were heard the same day, but there were practically two hearings. The company, a separate entity, is not a party to this suit, and any grievance it may have cannot properly be considered here.

In view of the record and of the law applicable thereto, the judgment of the trial court is

REVERSED.

CORNISH, J., concurring.

Men joining clubs, churches, brotherhoods, or exchanges understand that expulsion *ipso facto* extinguishes all rights. Why should it not? The association having performed the contract upon its part, upon what theory of the law can the member who may have, as in this case, violated the very purpose and spirit of the organization—honesty and fair dealing—recover back the consideration paid or damages? This is not forfeiture. What did he get and lose? The personal privilege of membership—a right or estate which *ab initio,* in its nature, and by the contract is limited and determined by his status as a member. The forfeiture which equity is said to abhor is the cutting off of an estate—depriving the person of something which is to vest in the injured person as a recompense. The member's interest could be likened to the license or estate which a farmer has who is permitted by his neighbor to use his private roadway so long as he will keep the gate shut and in repair. He can have no property right in the association, separate and distinct from membership. If he could, then he could sell it and retain the membership, which is absurd. In this respect it is like the interest of a partner in a firm, inseparable and untransferable except by consent of all the partners.

The association's right to expel a member for good cause and the consequent extinguishment of all his rights is primary and fundamental. If not expressed, it exists by implication, and is limited only as the rules of the association may limit it. And herein lies what room there is for controversy in the instant case. Rules which would permit the expelled member to sell the vacant seat, or to receive the proceeds of a sale, would create by contract a right incidental to membership which could be enforced. No property right, separate and distinct from membership, would arise. It would be rather a condition of the expulsion of a member. Such a provision would be a rare thing, unless made only for the benefit of creditors. There is, however, a provision that members in good standing may transfer their certificates, subject to the right of the association to refuse membership to the transferee, either because he is not a suitable person or because the membership has been in some "way impaired or forfeited." This provision is equitable and is made for those members who must move away or quit the association. It does not change the nature of a member's interest. It is a right granted to and incidental to membership as such. Being a privilege granted only to members in good standing, it never arises in favor of an expelled member, and he can base no claim upon it. Such power to transfer will not give a member to understand that he is the unconditional owner of a privilege of membership with power to transfer. It is conditioned, and the condition has not been complied with. It seems to me it never would or could give to the certificate a value on the market distinct from and independent of the qualification and right of its owner to a seat on the stock exchange, and that, in view of the terms of the contract, there is no escape from the conclusion that expulsion meant the loss of all rights acquired by virtue of the certificate. That such is the meaning of the contract appears, not only from this provision, but from the provisions of the contract providing for expulsion for fraud and the provision for reinstatement of an expelled mem-

ber only "upon payment of the regular initiation fee and annual assessment."

This holding seems to be in line with the decided cases. In the case entitled *In re Gaylord,* 111 Fed. 717, relied upon by plaintiff, and the only case, I believe, cited by plaintiff where were involved the rights of an expelled member, the plaintiff represented creditors of the member as trustee in bankruptcy. ° The dispute arose over the proceeds of the sale of the member's seat provided for by the rules. The rules provided that in the case of a suspended member or an expelled member the seat should be sold. In the case of the suspended member it provided that the proceeds should go to the member's creditors. Not to make the same application in the case of an expelled member would defeat the general purpose of the rules to protect the creditors. In the absence of explicit directions as to the application of the proceeds of the sale of an expelled member's seat, it was held that the rules as a whole intended that the proceeds should be applied in the same way, and any balance after payment of creditors should go to the member. The rules in question have no such provision.

So long as the association is not diverted from its purpose and does nothing against public policy, of course the contract controls and no estoppel arises.

SEDGWICK, J., dissenting.

1. Three questions are presented by this record and discussed in the briefs: (1) Did the paper writing known as the certificate of membership have an intrinsic market value distinct from and independent of the qualification and right of its owner to a seat upon the stock exchange? This is the fundamental question in the case and is the basis for all reasoning upon the two remaining questions. If the certificate had no distinct value but was of no value except to one who had a right to a seat upon the exchange, and was so involved in that right to such seat that it could not exist independently of the active participation of the owner of the certificate in the business of

the exchange, the plaintiff, of course, could not maintain this action if he was lawfully expelled from the exchange, and the judgment of the district court would necessarily be reversed. (2) If it should be found that this certificate has an intrinsic value independent of a seat upon the exchange, so that it constitutes an item of property that may be and habitually is transferred to and from those who have no seat upon the exchange and do not expect to have, and has a definite market value in such exchanges, then the second question is: Do the articles and rules of the association contemplate and authorize the forfeiture of this property upon the expulsion of its owner from a seat upon the exchange? (3) If it should be found that the owner of such certificate has a property interest in it distinct from his right to a seat upon the exchange, and that the articles and rules do not authorize the forfeiture of such property upon the expulsion of a member from his seat on the exchange, the third question would be whether the action of the association amounted to a conversion of this property.

Upon the first question the evidence appears to me to be clear and conclusive that the certificates sold by this association for $3,000 have a distinct value independent of the participation of their owners in the business of the exchange. The evidence is without contradiction that these certificates are and have been continually bought and sold by parties not connected with the exchange, and that they had a well-defined and generally recognized market value. The owner of such a certificate, whether or not he intends to apply for a seat upon the exchange, may deposit such certificate as collateral security for a loan at the banks of Omaha, and the banks generally receive them as such security. The defendant in this case has furnished evidence that it was understood by the directors of this association that this was the case, and that this certificate might be sold upon the markets in Omaha in the same manner that negotiable notes are sold, unless some action was taken by the association to prevent it. The defendant caused a public

notice to be published in the official paper of the exchange, which had an extensive circulation, that this plaintiff's certificate (describing it) "is wholly without value and the public are hereby warned against purchasing the same," which was an unequivocal admission and declaration that the practice of treating these certificates as articles of barter and sale by the public was known to the officers of the association, and that some affirmative action was necessary to destroy its market value. Indeed, it does not appear to be seriously questioned in the evidence, or contended in the briefs, that these certificates were not freely bought and sold by the public generally without regard to the right to a seat upon the exchange. This fact furnished an inducement to purchase these certificates from the defendant, and so enable the defendant to realize more from the sale of these certificates than in all probability it would otherwise have been able to do.

2. As these certificates had an independent value of their own upon the markets in Omaha, in determining whether the articles and by-laws authorized a forfeiture of this property upon the expulsion of a member from a seat upon the exchange, we must of course be governed by the universal rule that the law does not favor forfeitures, and that the right to declare a forfeiture must be clearly expressed and cannot be derived from inference or analogy. There is no express provision in the articles and rules of the association for forfeiting this property upon the expulsion of a member from a seat upon the exchange. The majority opinion derives this power by inference. It says: "Can any reasonable inference be drawn therefrom (sections 7 and 10 of rule 11) other than that expulsion of a member for bad faith and dishonest conduct means the utter annulment of the certificate and every privilege that pertained thereto before expulsion?" The following is quoted from rule 11 as compelling such an inference: "An expelled member shall not be readmitted to membership except upon payment of the regular initiation fee and annual assessment."

That "initiation fee and annual assessment" includes the original cost of the certificate of $3,000 may be a legitimate inference, but it is no stronger than contrary inferences that may be drawn from other language of the articles and rules. Again, in section 5 of rule 9, which is referred to in the opinion as strengthening the inference that the "initiation fee" mentioned in rule 11 should be construed to mean the original cost of the certificate, the words "initiation fee" are not used, but the "certificate of membership therein" is specified. It seems to be inferred that "initiation fee" means $3,000, the original purchase price of the certificate, and that, while in other rules the certificate is specifically named as such, in this rule it is to be inferred. In an opinion in the briefs, said to have been the opinion of the trial judge, it is said that the expulsion itself was unlawful. I do not find it necessary to examine that proposition. It is enough to know that this court in its opinion has found that "a certificate of membership in an exchange is a species of property," and that property cannot be forfeited by inference or implication, but authority to forfeit must be conferred in express words. The defendant took active and effectual measures to destroy the value of this certificate, which in law is a conversion.

I think the judgment of the district court is right and should be affirmed.

MORRISSEY, C. J., concurs in this dissent.

JULIA AHRENS ET AL., APPELLEES, V. LINCOLN G. SIMON, APPELLANT: B. A. JONES ET AL., APPELLEES.

FILED NOVEMBER 3, 1917. No. 19598.

1. **Trusts: RESULTING TRUST.** Where two persons enter into an agreement to purchase real estate, and each contributes one-half of the purchase price, but the title is taken in the name of one of the parties, a resulting trust immediately arises in favor of the other to the extent of his interest.

2. Evidence examined, and *held* sufficient to sustain the decree of the district court.

APPEAL from the district court for Cheyenne county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland and *Stout, Rose & Wells,* for appellant.

Wilcox & Halligan and *J. L. McIntosh, contra.*

MORRISSEY, C. J.

Plaintiffs, as the representatives of Milton Ahrens, deceased, instituted this proceeding in the district court for Cheyenne county for the purpose of establishing an undivided one-half interest in a quarter-section of land, which it is alleged had been purchased jointly by Milton Ahrens, now deceased, and the defendant, Lincoln G. Simon, and the title deed taken in the name of Simon, but for the benefit of both. The court entered a decree in favor of plaintiffs, and defendant has appealed.

There is little dispute between the parties as to the rule of law which would create a resulting trust, but they differ widely in the effect which they would give the evidence. Ahrens' contribution to the purchase price is shown by oral testimony, by the books of the bank through which the deed passed, and by a check, of even date with the transaction, marked "Exhibit A," and bearing a notation upon its face, claimed to be in the handwriting of Mr. Ahrens, showing that it was given in connection with the purchase of the land in controversy. The notation upon this check is denominated by appellant as a self-serving hearsay declaration, and we are urged for this reason to reject it. The check was found with other canceled checks of Ahrens, in the bank against which it had been drawn, after the death of Ahrens, and the circumstances are such, plaintiff says, that we may assume that the notation was made at the time of the transaction, and before the check was presented for payment. The check is for the sum of $575.06. And this amount, added to other items of charge made by the bank

through which the deal was had, foot up exactly one-half the purchase price of the land.

The evidence is sufficient to sustain the decree without the notation on this check. Considering all the evidence including the admissions made by defendant himself there is no escape from the conclusion that Ahrens and Simon arranged to purchase this land, each to have an undivided one-half interest, and each to contribute one-half of the purchase price, and that, pursuant to this agreement, Mr. Ahrens contributed one-half of the cash payment at or before the delivery of the deed to Simon.

The decree is amply sustained, and the judgment is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

JOHN A. LAWLER, TRUSTEE, APPELLANT, V. AMERICAN SURETY COMPANY ET AL., APPELLEES.

FILED NOVEMBER 3, 1917. No. 19631.

Costs: ATTORNEY'S FEES. In a suit on a surety company bond, the petition did not ask for attorney fees. Judgment was entered in favor of the plaintiff for the full amount prayed, with interest and costs. A motion was then filed praying for the allowance of an attorney fee. This was denied, and the judgment debtor paid into court the full amount of the judgment and costs. The judgment creditor accepted the same and entered a release of the judgment and costs on the records of the court. *Held*, that he cannot, at a subsequent term of the court, have a retaxation of the costs so as to award him an attorney fee.

APPEAL from the district court for Adams county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

M. A. Hartigan and *J. W. James*, for appellant.

Montgomery, Hall & Young and *Tibbets, Morey, Fuller & Tibbets, contra.*

MORRISSEY, C. J.

Plaintiff, as trustee in bankruptcy, brought suit in the district court for Adams county against defendant, as surety on a supersedeas bond. Trial was had, and judgment entered in the amount prayed, with costs, October 6, 1915. Two days later plaintiff filed an application praying for the allowance of $200 attorney fees. This was, on the same day, overruled, to which ruling the plaintiff excepted. The term of court at which this judgment was entered adjourned *sine die,* October 30, 1915. Subsequently defendant paid into court the full amount of the judgment and costs, and November 23, 1915, plaintiff received the same from the clerk and entered a full release on the court docket.

December 8, 1915, after the adjournment *sine die* of the term at which the judgment was entered, and after the receipt of the money and the release of the judgment, plaintiff filed another motion to retax costs. This motion was overruled, and plaintiff has appealed.

The original petition did not contain a prayer for attorney fees. Plaintiff says in his brief that the costs are no part of the judgment, and that the court may retax them any time the matter is called to its attention; that when the amount of the judgment is paid into court the judgment creditor may accept the same and appeal from the taxation of costs. It is only necessary to say that plaintiff accepted, not only the main judgment, but the amount taxed as costs as well, and he is now estopped to press his claim for attorney fees, if any he ever had.

The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

FIRST NATIONAL BANK, APPELLEE, V. GEORGE J. HUNT ET AL., APPELLANTS.

FILED NOVEMBER 3, 1917. No. 19678.

1. **Mortgages:** FORECLOSURE SALE: SETTING ASIDE: INADEQUACY OF PRICE. A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake.
2. ———: ———. The general rule in this state is that in judicial sales distinct tracts of land should be appraised and sold separately, but the district court may provide in a decree of foreclosure for the appraisement and sale of mortgaged property in parcels or *en masse* as the best interests of the parties may require.
3. ———: ———: SETTING ASIDE SALE. Where a decree of foreclosure contains no direction to the officer as to the manner of sale, and the property is contiguous and was mortgaged as a single tract, its appraisal and sale as such will not be disturbed in the absence of a showing of prejudice to the complaining party. *Clark v. Birge*, 100 Neb. 769.
4. ———: ———: DUTY OF MORTGAGOR. Where a tract of land consisting of many government subdivisions is mortgaged as an entire tract, the debtor, if he desires it sold in parcels, should apply to the district court to direct the officer selling the same in what manner the sale should be made, or, since the officer in the absence of directions is vested with discretionary power, he should point out to such officer the manner in which he believes the property should be divided in order to sell to best advantage.
5. ———: ———: SETTING ASIDE SALE: LACHES. Where the record does not show that the judgment debtor took steps to procure the direction of the court that the land be sold in separate tracts, or requested that the officer sell in such manner, he is not entitled as a matter of right to have the sale set aside because the land was sold *en masse*.
6. ———: ———: ———: IMPOSITION OF TERMS. Upon appeal from an order confirming a sale of real estate under foreclosure, a court of equity may in its discretion impose terms as a condition to setting aside the confirmation and allowing a resale, if it is equitable between the parties to do so.

APPEAL from the district court for Morrill county: RALPH W. HOBART, JUDGE. *Reversed on condition.*

F. A. Wright and *G. J. Hunt,* for appellants.

John W. Parish and *K. W. McDonald, contra.*

LETTON, J.

This is an appeal from an order confirming a sale of a large tract of land in Morrill county, consisting of over 800 acres, under foreclosure, to satisfy a decree for $31,419.87. A small portion of the tract is laid out in lots as an addition to Bridgeport. The return to the order of sale shows that the lands were duly advertised and were sold to plaintiff for $45,000, being more than two-thirds of the appraised value. A motion by plaintiff to confirm the sale was made, and an affidavit setting forth the execution of the notes and mortgage in 1907; the rendition, on June 29, 1909, of a default decree of foreclosure; that four different appraisements have been made and two offers of sale made under each appraisement without bidders; that tax liens and other liens which are prior and superior to plaintiff's mortgage together with interest and costs, will make the amount invested in the land by plaintiff by the time it secures possession nearly $50,000. There is also an affidavit that the affiant knows the land; that it has not yielded interest upon an investment of $25 an acre, and is not worth now to exceed $40 an acre; that $45,000 is more than it is worth, and that it "would not sell for as much as that under any other conditions than it was sold."

A counter affidavit was filed to the effect that there is a demand for lots and small tracts of from one to ten acres in size adjoining towns in that locality; that none of the lands in the immediate vicinity has changed hands recently; that this land is not all alike in quality, but the larger portion of it is of the quality that is considered the best in the valley; that the tract in an entirety is worth on an average $115 an acre, and, if sold in tracts within the reach of small farmers, the affiant believes that demand would be found for it at prices from $150 to $300 an acre; that a tract as large

as this could not be sold in fairness by offering it as an entirety, and by offering it on a cash basis.

Another affiant states that as an entirety the land is worth on an average at least $100 an acre; that, if sold entire, it would not bring its value, for the reason that the parties living in that section have not the means of buying and paying cash for such a large tract; that the test of value is not by what it brings at public sale for cash, but what the land sells for in small tracts and on terms; that affiant has compiled abstracts for land sold in 40, 80, and 160-acre tracts lying from six to ten miles from a railroad station at prices ranging from $60 to $85 an acre.

Defendant deposes that the land is worth more than twice the purchase price, and, if sold in smaller tracts, he believes that a subsequent sale on more reasonable terms and under modified circumstances would bring a much larger sum.

In *Kane v. Jonasen*, 55 Neb. 757, it was said: "The general rule is that distinct tracts of land sold on judicial process should be separately appraised and sold separately. *Laughlin v. Schuyler*, 1 Neb. 409. * * * It is undoubtedly within the province of the district court to provide in a decree of foreclosure for the appraisement and sale of mortgaged premises in parcels or *en masse*, as the best interest of the parties may require. *Macomb v. Prentis*, 57 Mich. 225; *Geuda Springs Town & Water Co. v. Lombard*, 57 Kan. 625; *Montague v. Raleigh Savings Bank*, 118 N. Car. 283. And, if no direction in relation to the matter is contained in the decree, the officer charged with its execution is vested with discretionary power, and his action in the premises will be sustained in the absence of an affirmative showing of prejudice by the complaining party. *Hughes v. Riggs*, 84 Md. 502; *Johnson v. Garrett*, 16 N. J. Eq. 31." In that case there was no evidence that any prejudice had resulted to defendant. The court said it would presume in the absence of evidence, that the officer was regardful of the rights of the parties, and the order of confirmation

was affirmed. Other cases bearing on this point are: *Mallory v. Patterson,* 63 Neb. 429; *La Selle v. Nicholls,* 56 Neb. 458; *Clark v. Birge,* 100 Neb. 769.

It is the general rule in other jurisdictions that, where property which is susceptible of being sold in separate tracts is the subject of a foreclosure sale, it should, if practicable, be sold in parcels, rather than as an entirety. See note to *Miller v. Trudgeon,* 8 Ann. Cas. 739 (16 Okla. 337), and note to *Thomas v. Thomas,* Ann. Cas. 1913B, 616 (44 Mont. 102), in which notes the cases are quite fully collected. The object is to allow freer competition, so that each tract may bring the best price, and that no more land be sold than enough to pay the debt. This has been adopted by this court as the proper method of sale under such decrees, and sales of tracts *en masse* have been permitted to stand only where no prejudice is shown to have resulted. Where no direction is given in the decree, the manner of sale is to some extent in the discretion of the officer. This property is in one body, but it composes many governmental subdivisions. It is not shown that it is fenced in separate tracts, or even cultivated as separate farms; the only element of division seems to be the distinction between the small portion subdivided into village lots and farm land. It would seem that the better practice, where such a large contiguous tract of land is to be sold, is that the direction of the court be taken as to the manner in which the sale should be made, or the debtor, if he desires it sold in parcels, should point out to the officer the manner in which he believes the property would sell to best advantage. The proper method would seem to be that the property should be offered first in parcels in accordance with the reasonable suggestions of the debtor or the directions of the court, and, if the total amount bid for all does not equal the mortgage debt, then it should be offered in gross. Whichever of these results produces the largest amount of money should be finally adopted and the property awarded to the proper bidder. However, if the debtor permits the sale to be made *en masse* without

objection, and afterwards, when a motion is made for confirmation, to allow him to come in with the plea that the land should have been sold in parcels would seem to allow him to take advantage of his own laches.

This court has repeatedly refused to set aside sales of real estate on account of mere inadequacy of price, unless such inadequacy was so gross as to make it appear that it was the result of fraud or mistake. *Vought v. Foxworthy,* 38 Neb. 790; *Kearney Land & Investment Co. v. Aspinwall,* 45 Neb. 601; *Iowa Loan & Trust Co. v. Stimpson,* 53 Neb. 536; *Green v. Paul,* 60 Neb. 7; *Jones v. Cleary,* 2 Neb. (Unof.) 541. But where the evidence seems to indicate that men of means sufficient to buy the whole tract are very rare in the vicinity, that the land, if sold in parcels, would be more salable, and that the price for which it actually sold is much less than its actual value, the concurrence of these factors may make the result so harmful to the rights of the debtor that a resale should be had. *Ryan v. Wilson,* 64 N. J. Eq. 797.

It appears that this land had been appraised four times and offered for sale eight times before the sale in controversy, and, so far as the record shows, the debtor made no attempt during the six years after the decree in which the sale proceedings were pending to procure the direction of the court as to the manner of sale, or to control the discretion of the selling officer by requesting and setting forth reasons why the land should be sold in separate parcels. It was said at the hearing that the sheriff had been ordered by the creditor to sell as a whole, and by the debtor to sell in separate tracts, but this was disputed, and there is no proof of either of these statements in the record. Interest on the debt and on delinquent taxes is piling up at the rate of over $200 a month. A resale will probably cause a delay of at least six months and will entail additional costs. It is over six years since the debt matured, and the creditor is entitled to its money.

Even if the land is of much less value than the defendant asserts, the proceeds of a resale in separate tracts

ought to be sufficient to pay the added costs, together with interest upon the whole debt until a resale can take place and the proceeds be realized. It is not infrequent that courts of equity impose terms upon setting aside a confirmation and allowing a resale of property. *Porch v. Agnew Co.*, 66 N. J. Eq. 232; *Henderson v. Kibbie*, 211 Ill. 556. There can be no hardship in requiring the defendant as a condition to the relief sought either by resale under the decree, or by the additional time allowed under which to sell at private sale and redeem, to enter into a bond in the sum of $2,000 to indemnify plaintiff from all loss and damages that may result in the event that the property on resale does not produce enough to pay the amount bid at the sale, with interest at the rate fixed in the decree, and the additional costs incurred by resale.

The judgment of the district court is affirmed, unless the defendant within 30 days execute and file in the office of the clerk of this court such a bond, with sureties to be approved by the clerk of the district court for Morrill county. If such bond is given and approved within said time, then the judgment is reversed and the cause remanded, with leave for defendant to apply to the district court for directions to the officer as to the manner in which the sale should be made, or to apply to the officer at or before the time of the sale to sell in separate tracts as may seem best to produce the largest amount of money.

JUDGMENT ACCORDINGLY.

WILLIAM MCCARTER, APPELLANT, V. ED A. LAVERY, COUNTY COMMISSIONER, APPELLEE.

FILED NOVEMBER 3, 1917. No. 19679.

1. **Appeal: DISMISSAL: EXTRINSIC EVIDENCE.** An appeal by the plaintiff may be dismissed, where, during its pendency, without any fault of the defendant, an event occurs to prevent the appellate court

from granting plaintiff any effectual relief in case of a decision in his favor, and an event of that nature may be shown by extrinsic evidence.

2. ———: ———: ———. An appeal by a taxpayer from a dismissal of his suit to oust a county commissioner for misdemeanors in office may be dismissed, where it is shown that the official term of defendant expired pending the appeal, that another holds the office, that no effort was made to advance the appeal for a hearing during the incumbency of defendant, and that he did not prevent an early hearing.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Appeal dismissed.*

Niles E. Olsen, I. J. Nisley and *Wilcox & Halligan,* for appellant.

J. B. Strode, D. H. Moulds, W. A. Stewart, T. M. Hewitt, H. D. Rhea and *E. A. Cook, contra.*

ROSE, J.

This is a proceeding by a taxpayer to remove from office a county commissioner of Dawson county "for corruption" and "for wilful maladministration"—two statutory grounds. Rev. St. 1913, sec. 5698. Approval of excessive claims against the county and misconduct resulting in their allowance and payment are the foundations of plaintiff's charges. From a dismissal of the proceeding after a trial on the merits, plaintiff has appealed.

The appeal will not be determined. The purpose of the proceeding is to oust defendant from office. His term has long since expired and the office is now occupied by his successor. No effort to advance the appeal for a decision during the incumbency of defendant was made. The delay is not attributable to him. He made a successful defense in the trial court. Being out of office he cannot now be removed therefrom. His retirement at the expiration of his official term pending the appeal was an event making it impossible for the appellate court to grant plaintiff any effectual relief on the cause of action pleaded. That event is a ground for dismissing the

appeal, and, when not appearing on the record, may be shown by extrinsic evidence. *Mills v. Green*, 159 U. S. 651. The change in officers is asserted by defendant, and not denied. Courts properly decline to express an opinion on a mere abstraction, and may act on their own motion in dismissing an appeal involving only an inquiry of that nature. *Heesch v. Snyder*, 85 Neb. 778.

APPEAL DISMISSED.

OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE, V. WILLIAM D. COCKE, APPELLEE: FIRST NATIONAL BANK OF HASTINGS, APPELLANT.

FILED NOVEMBER 3, 1917. No. 19417.

Bills and Notes: INVALID PRINCIPAL: RECOVERY ON COLLATERAL. If a plaintiff has no interest in the note sued upon except as collateral security for a note held by him, he cannnot recover on the collateral if the principal note is wholly invalid.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Hainer & Craft, for appellant.

Morsman & Maxwell, contra.

SEDGWICK, J.

The First National Bank of Hastings was made defendant in a proceeding to foreclose a real estate mortgage given by the defendant Cocke, as mortgagor, to the Nebraska Hardware Company. The mortgage was foreclosed, the property sold, and the proceeds applied upon the mortgage. The bank held a note for $1,550, given it by the Nebraska Hardware Company, which it claimed was secured by the note and mortgage executed by the defendant Cocke, which had been turned over to the bank by the hardware company as collateral security, and asked the court in the foreclosure proceedings for a

deficiency judgment upon the collateral note, to be applied upon the note given to the bank by the hardware company. The defendant Cocke defended against the application for a deficiency judgment upon two grounds. He alleged that there was nothing further due upon the note and mortgage executed by him, and alleged that the $1,550 note which was given by the hardware company to the defendant bank was without consideration, was illegally issued, and was not a valid liability. The court found for the defendant, and the bank has appealed.

If a plaintiff has no interest in the note sued upon except as collateral security for a note held by him, he cannot recover on the collateral if the principal note is wholly invalid. In such case he has no title to the collateral, and is not the real party in interest in proceedings to collect thereon. Story, Bailments (9th ed.) secs. 300, 301; *Mutual Bank v. Burrell*, 60 N. Y. Supp. 522.

As the bank alleged no interest in the note upon which the mortgage had been foreclosed except as collateral security for the $1,550 note, if it should be found that there was no liability on this latter note, the bank could not recover in this action, and we will first consider that question. The $1,550 note which was given by the hardware company to the bank, it is conceded, was given in settlement of a former note which the bank held against one Fawthrop, upon which Jakway, who was the president of the hardware company, was indorser. The defendant Cocke, who was a stockholder in the hardware company and was familiar with its business, testified that there was no other consideration for the $1,550 note owned by the bank than the personal liability of Jakway and another, and that the note was fraudulently executed in the name of the hardware company by Jakway and another without any authority from the corporation to assume on its part the said liability. The records of the hardware company were not in evidence upon this question, but were under the control of Jakway and others, who were hostile to the interests of Cocke, and

were witnesses for the bank in this litigation, and it is contended on the part of the defendant Cocke that it devolved upon the bank, in the face of this evidence, to show that the corporation had authorized the assumption of this liability on its part. In answer to this contention, the brief of the bank quotes from section 5377, Rev. St. 1913, the negotiable instruments law:

"Every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

It is not contended, so far as we have observed, that the bank was a holder in due course, that is, that the bank was an innocent purchaser of this collateral and was entitled to recover thereon as such. Indeed, so far as it is pointed out in the briefs, the bank took this collateral after it was due and could not therefore be a holder in due course. The section of the statute quoted, therefore, has no application to the question whether there was any consideration for this note, and whether its execution and delivery to the bank was the valid act of the corporation. The defendant Cocke alleged and undertook to prove a negative, that is, that the corporation had not assumed the liability of Jakway and another, and had not authorized the execution of the note, and, under the familiar rule, when he had produced such positive testimony supporting his contention, it devolved upon his opponent to prove the affirmative, which, if the corporation had assumed the liability and authorized the execution of the note, would be readily proved by the records of the corporation itself. Under these circumstances, and in the condition of this evidence, the court was justified in finding that the corporation had never assumed this liability and authorized the execution of

this note. As the bank had no claim which it could enforce against the corporation, and had no other interest in the collateral, it was not entitled to a deficiency judgment thereon.

The judgment of the district court is

AFFIRMED.

LAURA LINGLE, APPELLEE, V. FARMERS MUTUAL TELEPHONE COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 3, 1917. NO. 19645.

Creditors' Suit: DEFENSES: INSOLVENT CORPORATION. If an insolvent corporation sells all of its property and rights for cash or other property and distributes the same to some of its stockholders, the parties receiving it knowing all of the facts will be held to account to the creditors of the corporation for the property so received; and that they also contributed some of their individual rights to induce such sale and transfer will constitute no defense to an action to subject such property to the claims of creditors.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Berge & McCarty, for appellants.

R. J. Greene, contra.

SEDGWICK, J.

The plaintiff recovered a judgment against the Farmers Mutual Telephone Company. Execution was issued on the judgment and returned unsatisfied for want of property on which to levy. The plaintiff then began this action in the district court for Lancaster county against the Farmers Mutual Telephone Company and thirteen others who had been interested in that company. The plaintiff alleged that the Farmers Mutual Telephone Company, after the indebtedness was incurred upon which the judgment was rendered, had sold its property to the Lin-

coln Telephone & Telegraph Company for $525, and received in payment stock in the Lincoln Telephone & Telegraph Company which was issued and delivered to these defendants other than the Farmers Mutual Telephone Company; that the defendants who received the stock knew of existing conditions, and took the stock for the purpose of defrauding this plaintiff and preventing her from collecting the judgment. She asked that a receiver be appointed to take charge of the assets of the Farmers Mutual Telephone Company, including the shares of stock so issued to these defendants. The trial court found the issues in favor of the plaintiff and appointed a receiver as requested. The defendants have appealed.

The defendants admit the plaintiff's judgment and execution as alleged, and insist upon two principal defenses which are discussed at large both in the evidence and in the briefs.

1. The defendants say that the plaintiff was not employed by the Farmers Mutal Telephone Company, but was in reality employed and paid by independent users of telephones who owned their own telephones and the poles and the lines of the system. But the plaintiff's judgment against the company establishes that the company was indebted to her in the amount of that judgment, and as this question is foreclosed by the plaintiff's judgment it is not necessary to discuss it further here.

2. The second and principal contention of the defendants is that the property sold to the Lincoln Telephone & Telegraph Company was not the property of the Farmers Mutual Telephone Company, but was in reality the property of these other defendants and various other users of telephones. The answer to this contention plainly is that the Lincoln Telephone & Telegraph Company took a bill of sale, executed in the name of the Farmers Mutual Telephone Company, which purported to convey only property "owned by the Farmers Mutual Telephone Company in the town of Bennet, county of Lancaster, and state of Nebraska," and by this bill of sale the purchasing company of course took only such property as the grantor

in the bill of sale owned; that the Farmers Mutual Telephone Company owned some property rights that might be considered by the purchaser as of the value of $525 is clearly shown by the evidence.

Mr. Varney was sworn and testified as a witness in behalf of the defendants. He had acted as secretary and treasurer of the company for several years, and was familiar with its affairs, and was one of the parties who executed the bill of sale in behalf of the company, and testified in regard to the transaction of the sale. He testified that the real business that the Farmers Mutual Telephone Company had to do was "to see about making the exchange and the business at the central office." And when asked, "What was there in the telephone system in Bennet that was owned by the Farmers Mutual Telephone Company?" he answered, "Hardly anything." He was asked, "You know that the Nebraska Telephone & Telegraph Company now furnishes switch-board service and does the exchange for all those lines, don't you?" and answered, "Yes, sir. Q. And furnishes the switch board? A. Yes, sir." And when asked, "Now, you may state what is the difference in that system out there now than there was when the Farmers Mutual Telephone Company was operating it," he answered, "There is no difference now anymore than there was in 1907."

This is unequivocal evidence offered by the defendants themselves that the purchasing company took only the rights and interests of the judgment debtor. There is some evidence that these defendants, other than the judgment debtor, also relinquished some rights to the purchasing company for which they secured the entire consideration to the exclusion of this plaintiff and others who they say were equally interested in the company. If they parted with something in order to induce the purchaser to pay a larger price for the debtor company's interest with the intention of appropriating the entire proceeds of the sale, such conduct would not improve their position as against the plaintiff. Whether such rights and interests of the Farmers Mutual Telephone Company

were of the value of $525, which was received for them is not material in this matter. This money should have been used to pay this plaintiff her judgment for services in conducting the exchange, and the parties, who, knowing all the conditions, received the value for which the property and rights of the company were sold, should account to this plaintiff for the same. The trial court did right in appointing a receiver to take charge of these assets of the defendant company.

The judgment of the district court is

AFFIRMED.

ERNEST MEYER, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 3, 1917. No. 19343.

Action: PARTIES: REAL PARTY IN INTEREST. The evidence examined, and found not to sustain the verdict and judgment.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Reversed.*

A. A. McLaughlin, Wymer Dressler and *Lyle Hubbard,* for appellant.

Weaver & Giller, contra.

HAMER, J.

This is an action against the Chicago & North Western Railway Company to recover damages because of the alleged negligence of the company in the management and control of a car-load of potatoes shipped from Gordon, Nebraska, to N. H. Nelson of Omaha, Nebraska, a broker, doing business in Omaha, and who appears to have made an agreement with the plaintiff to deliver him the car-load of potatoes "F. O. B. Omaha." The case appears to have been tried before a justice of the peace, who rendered judgment against the defendant. Then it

was taken to the district court for Douglas county by the defendant on appeal. The petition in the district court alleged that the railroad company undertook and agreed to carry the car-load of potatoes from Gordon, Nebraska, to Omaha, Nebraska; that the potatoes were delivered to the railroad company at Gordon, Nebraska, in good condition, and that on account of the negligence and carelessness of the defendant company in the management and control of the potatoes they were "negligently and carelessly permitted to become frozen." There was a trial to a jury, which found against the defendant, and judgment was rendered against it for $117.16.

It is contended by the defendant that the plaintiff, Ernest Meyer, was not the real party in interest. There was evidence before the court tending to show that the potatoes belonged to "The Fair" at Gordon, Nebraska, of which W. L. Mills was the proprietor, and that Nelson engaged the potatoes from "The Fair," and that he paid the freight, and that the potatoes were consigned to him. Nelson was doing business as a broker at Omaha. The evidence shows that he went to Meyer, the plaintiff, on the 7th or 8th of November, 1911, and said: "Meyer, I have got a wire from Gordon, Nebraska, offer Ohio potatoes 82½ cents delivery. Q. 82½ cents a bushel? A. Yes, sir; delivered. * * * Q. F. O. B. Omaha? A. F. O. B. Omaha." The foregoing is Nelson's testimony. The bill of lading is dated November 9, 1911. The consignor is shown by it to be "The Fair" at Gordon, Nebraska. The consignee is shown to be N. H. Nelson, Omaha, Nebraska. The bill of lading is signed by the agent of the railroad company at Gordon, and by "The Fair, per W. L. Mills." Nelson testified that the potatoes arrived at Omaha November 15. The next day Meyer went to the railroad yard and received the potatoes. Nelson went with Meyer (at his request) and showed him the potatoes. He testifies as follows: "Q. Who paid the freight? A. I paid the freight on the car. Q. Well, you may tell when you received that car.

A. According to my memory the car arrived here on the 15th. It was set for delivery on the 16th. * * * Q. And you paid the freight? A. Yes, sir. Q. And sold the car to the Meyer Fruit Company? A. Yes, sir." Mills testified that the potatoes were loaded in sacks; that he purchased them from Bert Hull; that the potatoes had been hauled from the Hull ranch to Gordon in wagons; that the distance was made about 8 or 10 miles; that November 8 and 9, 1911, were employed in hauling and loading the potatoes.

Nelson appears to have contracted for the potatoes with a view to selling them to Meyer. Meyer had indicated his willingness to buy the potatoes if Nelson could deliver them to him at Omaha for 82½ cents a bushel. Nelson testified that he had sold a car to Meyer before the car arrived at Omaha; but an examination of his testimony shows that he had only orally engaged to sell them to Meyer, and that they had not yet arrived, and that nothing had been paid on them. Nelson testified that the paper marked "Exhibit 3" was the bill of lading, and that exhibit 2 was the expense bill, and that exhibit 1 was his bill against the Meyer Fruit Company, and that exhibit 3 was admitted, but there was an objection which was sustained as to the introduction of exhibits 1 and 2, which were held to be incompetent and immaterial. The former was a bill as follows:

"Omaha, Neb. 11-17-1911.

"E. Meyer Fruit Company, Omaha, Nebraska.

"Bought of N. H. Nelson & Co., Brokers.

"Terms Car ARL-3624

"296 Sax 34260 potatoes at 82½ cents per bu. $471.07"

The material contents of the latter have been heretofore stated.

The evidence shows that Nelson was the purchaser of the potatoes, and that he did not disclose to the seller, Mills, the fact that he was buying the potatoes for any other person. Mills, who was the proprietor of "The Fair," did not know that Meyer was going to get the potatoes. The transaction of Nelson contemplated that

he was to be the consignee, and that he was the real owner of the potatoes until such time as he sold and delivered them to Meyer. He had not delivered them to Meyer at the time they arrived in Omaha, and he took Meyer and showed him the potatoes where they were in a car standing on the railroad track. If Mills had then seen fit to find fault with them and had refused to accept them, he could have done so. Meyer gave his check to Nelson for the price of the potatoes, but says that the price of other articles was included in the check and paid for at the same time. That would seem to show that Nelson was regarded as the owner of the potatoes both by Nelson and Meyer, and that Nelson sold them to Meyer after they arrived in Omaha. Nelson testified that he (Nelson) paid for the potatoes; also, that "he (Meyer) paid us in full for the car." Meyer testified: "Q. Do you know when you paid him (Nelson) for those potatoes? A. I could not say. I guess I paid in a few days, two or three days (from the time the potatoes arrived)." Meyer was notified by Nelson on the 15th of November that the potatoes had arrived. He (Meyer) unloaded them the next day. Meyer testified he did not pay for the potatoes until after he saw them.

While Nelson was a broker, he did not buy the potatoes from Mills as the agent of Meyer. The evidence does not show that Nelson was the agent of Meyer. The minds of Mills and Meyer never met, because they never saw each other and never communicated in any way. Nelson may have been morally bound to offer the potatoes to Meyer at 82½ cents a bushel, but he was not legally bound to do so. He could have sold them to any other proposed purchaser and such purchaser would have had a good title to them. Meyer paid no money on the potatoes before he received them, and then, after he had received them, some days after, he gave Nelson a check in payment of a balance due, and this check included other items of indebtedness due from Meyer to Nelson. Nelson could not have successfully maintained an action against Meyer for the price of the potatoes

until after he (Nelson) had delivered them. Neither could Meyer have successfully maintained an action of replevin for the potatoes against Nelson until after he (Meyer) paid for them. Meyer had no contract in writing with Nelson which obligated him (Nelson) to deliver the potatoes to Meyer. Nor had Meyer paid any money on the purchase price. The railway company could not have charged Meyer for the freight because he was not a party to the shipment. In the shipment of the potatoes the railway company did not know the plaintiff, Meyer. Meyer did not know the railway company. We are unable to say from the evidence that the potatoes were the property of the plaintiff at the time they were shipped from Gordon, and unless they were, or unless the claim for damages was assigned by Nelson to Meyer, we do not see our way clearly concerning the right of the plaintiff to maintain the action. The defendant railway company insists upon its legal rights and we cannot disregard them.

Section 7582, Rev. St. 1913, provides: "Every action must be prosecuted in the name of the real property in interest, except as otherwise provided in section twenty-six." In *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321, it was held: "If the contract between the parties expressly provides that delivery shall be made at a certain place, then the vendor's title to the property is not divested until delivery is so made." Nelson received the property at Gordon because he paid the freight upon it. In the arrangement which he made with Meyer, Meyer was to receive the property "F. O. B. Omaha." When Meyer received the property on the 16th of November, it was then delivered to him. This would make Nelson the owner of the property during the time of its transportation and until delivery to Meyer. Where the contract of purchase requires shipment and delivery of the goods at a designated place, the title does not vest in the purchaser until delivery at such place. *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321; Newmark, Law of Sales, sec.

166. See note to *Ramsey & Gore Mfg. Co. v. Kelsea*, 22 L. R. A. 415, 421 (55 N. J. Law, 320).

One who becomes the owner of goods by purchase from the consignee after transportation has ended cannot maintain an action against the carrier for damage to the goods in transit, in the absence of an assignment of such claim for damages from the consignee who was the owner during the transportation. *Union P. R. Co. v. Stickel Lumber Co.*, 99 Neb. 564.

We do not see that the plaintiff has proved a cause of action against defendant, and the judgment is therefore reversed and the cause remanded.

REVERSED.

ROSE, J., dissents.

SEDGWICK, J., dissenting.

In the majority opinion the difficult question involved in this case is not discussed. The case is determined entirely upon the question as to whether the plaintiff is the real party in interest. Nelson was a broker. Meyer was engaged in the retail business, in which he bought and sold potatoes. Nelson informed Meyer that he could get a car-load of potatoes at a certain price per bushel. Meyer told him he would take them. Nelson was not a dealer in potatoes. He ordered only the quantity wanted by Meyer, and ordered them in his (Nelson's) name. They were shipped in Nelson's name, and when they arrived Meyer took the whole order and paid Nelson the agreed price, and found that the potatoes were frozen. The real party in interest is the one who would suffer a loss by reason of the freezing of the potatoes. If Meyer agreed that Nelson should procure the potatoes for him, and Nelson did so, and Meyer furnished the money for them, Meyer is the one who suffered the loss. On the other hand, if Meyer had agreed that if Nelson would order the potatoes and get them there he would buy them from Nelson if they were in good condition, then if the potatoes were frozen Meyer would not be liable to Nelson and should not have received the pota-

toes. Neither of the parties so understood the transaction. Nelson as a broker assumed that he ordered the potatoes for Meyer, as they agreed he should, and they both understood that Meyer must take them, which he did. Even if their contract had not been plainly definite that Nelson as a broker was ordering the potatoes for Meyer, still if Nelson had so understood it, and insisted that Meyer take them as purchased for him, and Meyer had acquiesced and taken the potatoes and paid in full the original purchase price, the jury upon such evidence might find that Meyer was damaged by the freezing of the potatoes. Meyer evidently was not a very tactful witness and not very well posted in these nice questions of law, and his testimony is somewhat childlike, but if Nelson had brought this action instead of Meyer the jury might have found upon this evidence that he was not the real party in interest. Meyer has paid the full purchase price of the potatoes, so that Nelson has neither lost anything nor is he in danger of losing by the freezing of the potatoes. He could not recover any damages for he has suffered none. Meyer although paying for sound potatoes, has received frozen ones. He is greatly damaged. If the defendant negligently caused these damages, Meyer should recover in this case. The question as to whether Meyer was the real party in interest was submitted to the jury by an instruction of the court, in which the court told the jury that unless Meyer owned the potatoes he could not recover. The jury found upon that issue under this evidence that Meyer could recover. It seems very clear that this evidence supports the finding that Meyer is the real party in interest. No one but Meyer can recover, and this decision frees the defendant from liability without considering whether or not its negligence caused the damage.

DORIS ROUTT, APPELLEE, v. BROTHERHOOD OF RAILROAD TRAINMEN, APPELLANT.

FILED NOVEMBER 3, 1917. No. 19503.

1. **Insurance:** CONTRACT: CONSTRUCTION. When there is ambiguity in the terms of the contract and certificate of insurance in a fraternal beneficiary company, it will be construed in such way as to accomplish the purpose intended, whenever the same may be done without violence to the expressed terms of the contract, and in accordance with the aims and purposes of such fraternal brotherhood.

2. ———: ———: LOSS OF SIGHT. Where the peculiar malady known as "color-blindness" so impairs the sight that a member of such association who is insured therein is disabled and is unable longer to continue in the train service, and is discharged therefrom on account of such defect in his vision, this constitutes the complete and permanent loss of sight of both eyes within the meaning of the contract stated in the opinion.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

Lambert, Shotwell & Shotwell, contra.

HAMER, J.

The plaintiff and appellee brought suit in the district court for Douglas county seeking to recover on a benefit certificate held by him in the defendant company, a fraternal insurance association. He had for some time prior to June 5, 1913, been employed by the Union Pacific Railroad Company as a railway trainman. As a member of the appellant association he carried insurance to protect himself against disability. He became afflicted with what is known as "color-blindness," and was discharged from the service of the railroad company because of his infirmity. It is contended by the plaintiff that as a railroad trainman he had become totally blind, and that within the terms of the policy held by him in

the defendant association he had suffered the complete and permanent loss of the sight of both eyes. The defendant denied liability upon the ground that "color-blindness" was not a complete and permanent loss of the sight of both eyes. It was also denied that the plaintiff was totally disabled under the meaning of the constitution and by-laws of the defendant. There was a verdict and judgment for the plaintiff for the full face of the policy and interest, amounting in all to $1,740.

The question to be determined, therefore, is whether the total color-blindness sustained by a railway trainman while a member of the defendant association, and which color-blindness disqualified such member from such service, is to be construed as the complete and permanent loss of the sight of both eyes. It appears that the Brotherhood of Railroad Trainmen is an association of many thousand persons organized to promote the welfare of railway trainmen, and to provide insurance for its members, and having a grand lodge at Cleveland, Ohio, and subordinate lodges located in various cities of the United States, one of which is located in the city of Omaha, Nebraska, known as Success Lodge No. 135; that defendant is a fraternal insurance association, and receives from each of its members regular assessments to provide a fund for the payment of sick, accident and death benefits to its members; that during and prior to the month of June, 1913, plaintiff had been a member of the defendant association for a period of more than five years, and on the 1st day of July, 1913, was a member in good standing of Success Lodge No. 135; that the plaintiff had regularly paid his dues and complied with the rules and by-laws of the association; that when the plaintiff became employed by the Union Pacific Railroad Company, September 17, 1907, he was in good health and good physical condition, and was able to perform his duties as a trainman, and did so perform them up to and including the 5th day of June, 1913, when he was discharged from the employment of the said railroad company for the reason that he had become afflicted

with a disease known as "color-blindness," which disease totally and permanently incapacitated him for the duties of a railway trainman. Rule 68 of the defendant association provides: "Any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise." The plaintiff has complied with all the rules of the association.

In *Kane v. Chicago, B. & Q. R. Co.*, 90 Neb. 112, it was held: "A railway night switchman becoming color-blind during his employment is thereby disabled by sickness within the meaning of his employer's contract that it will pay him sick benefits for a limited period while he is disabled by sickness or accidental injury, provided the fact be established by proof of acute or constitutional disease." The court said: "There is sufficient evidence to sustain findings to the effect that the plaintiff became color-blind while in the defendant's employ, that he was discharged because of that defect, and that his condition incapacitated him from following his vocation or any other equally as remunerative." In that case the relief department had certain by-laws which, among other things, provided: "Wherever used in these regulations the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work." A second provision in the by-laws reads: "To establish a claim for sick benefits there must be positive evidence of acute or constitutional disease sufficient to cause disability."

It is claimed in this case that if the plaintiff could use his eyes for any purpose he was not disabled within

the meaning of the provisions contained in section 68, above quoted, and the constitution and by-laws of the association.

In *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183, the question was whether a total loss of three fingers and an injury to the remaining finger and thumb which interfered with their use, and a cutting away of a part of the palm of the hand, constituted a total loss of the hand within the meaning of a by-law of a mutual benefit association providing "indemnity for any member in good standing suffering, by means of physical separation, the loss of a hand at or above the wrist joint." It was contended that in any event the hand should be cut off above the wrist before the plaintiff might recover. The plaintiff was a brakeman, and he was in "Class C." Section 37 of the constitution of the order provided that the member should be entitled to the amount of his certificate "upon his becoming permanently and totally disabled within the meaning of section 45." Section 45 reads: "Any member in good standing, suffering, by means of physical separation, either the loss of a hand at or above the wrist joint, or suffering the loss of a foot at or above the ankle joint, or suffering the loss of the sight of both eyes, shall be considered totally and permanently disabled, and shall receive the full amount of his beneficiary certificate, but not otherwise." In that case the plaintiff received a personal injury by cutting his left hand while splitting wood. As a result of the injury he lost his second, third and fourth fingers and about half of the second, third and fourth metacarpal bones, which removed nearly the half of the palm of his hand, damaged the first and second joints of the index finger, and caused a running sore on the thumb between the second and third joints, which stiffened and impaired the motion of the thumb and practically destroyed its usefulness. The plaintiff's testimony tended to show that the injury had destroyed the usefulness of the hand, but there was evidence offered by the defendant to show that the remaining thumb and finger on the hand

and the stiffened wrist joint were still of some utility to the plaintiff. It was a case very like this. Color-blindness is a loss of the sight and an inability to see certain colors. In the case cited a part of the hand had clearly been left. There was a thumb and a finger. This brings us to the question whether it was the use of the hand that was meant, or its actual loss. This court held it was the use. In the body of the opinion it is said: "What did the defendant company contract to insure against under the provisions of this by-law? Was it the severance of the entire hand at or above the wrist joint, or was it the entire loss of the use of the hand? * * * If the only risk assumed by defendant was the amputation of the whole hand, then the learned trial court was fully justified in directing a verdict for defendant; but, if a fair and liberal interpretation of the contract most favorable to the insured can make it a risk which includes the total loss of the use of the hand by severance, then the question as to whether such loss is established by the evidence is properly one for the triers of such facts. If the officers of the society, who prepared the by-law in which the contract is set forth, have used ambiguous terms, the ambiguities must be interpreted in the manner most favorable to the insured."

In *Lord v. American Mutual Accident Ass'n*, 89 Wis. 19, there was a policy containing a provision for the payment if the injury caused an "immediate, continuous, and total disability." In that case it was held that it was a proper question for the jury to determine whether a total loss of three fingers and part of another on the same hand, and the destruction of the joint of the thumb, and a cutting of the hand, constituted a total loss within the meaning of such provision. The court said: "It is contended that there is no such thing as the loss of the hand unless the injury is such as to require the amputation of the hand above the wrist. That would be too much of a refinement upon language for practical purposes. The hand was for use; and, if it was injured

so as to become useless as a hand, then the defendant became liable for its loss under the contract."

In *Sneck v. Travelers Ins. Co.*, 88 Hun. (N. Y.) 94, 34 N. Y. Supp. 545, the action was on a policy against a "loss by severance of one entire hand or foot." There was a loss of a part of the hand by severance. The plaintiff testified that he had no use of the hand. The court held that the word "severance" in the policy meant the method by which the accident occurred, and that it was the loss of the use of the hand that was insured against, and that the question as to whether the loss was total under the evidence was one of fact for the jury. The same case was reviewed by the court of appeals in 156 N. Y. 669, and the last majority opinion of the intermediate court was approved without division.

Applying the principle declared in the above cases, complete and permanent loss of the sight of both eyes means loss of the use of the eyesight of both eyes for the purposes of the insured's avocation. *Moore v. Ætna Life Ins. Co.*, 75 Or. 47; *Theorell v. Supreme Court of Honor*, 115 Ill. App. 313; *Supreme Court of Honor v. Turner*, 99 Ill. App. 310; *Sheanon v. Pacific Mutual Life Ins. Co.*, 77 Wis. 618; *International Travelers Ass'n v. Rogers*, 163 S. W. (Tex. Civ. App.) 421.

The plaintiff sought indemnity because of the anticipated loss of the sight of his eyes. That part of section 38 which relates to loss of the eyes reads: "Or who shall suffer the complete and permanent loss of sight of both eyes." The condition is not made that the eyes of the insured shall be taken out of their sockets and away from his physical body, but only that he "shall suffer the complete and permanent loss of sight of both eyes." It does not say that he shall become blind in both eyes so as to become unable to see objects of any kind, but that he shall lose "the sight of both eyes." This he did when he became color-blind. He lost his sight in both eyes. It affected both eyes alike. Besides, the color-blindness was "complete and permanent." He could not see, and that applied to both eyes, and he

was discharged because the defect in his vision made him unfit for railroad service. The thing for which he sought indemnity, loss of his vision, came to him. If his insurance does not indemnify him, it serves no good purpose. Besides, it is ambiguous and misleading and should be construed as the defendant knew the plaintiff would understand it.

A fraternal insurance association of railroad trainmen established and maintained with special reference to furnishing insurance for the benefit of those who are injured by sickness or accident during the time of their employment in the railroad service, and who are thereby disqualified from following their avocation as trainmen, will be deemed to have intended the benefits promised by its insurance certificate, its constitution, by-laws and rules, and, in case of ambiguity in the language used, it will be construed in such a way as to accomplish the purpose intended, whenever the same may be done without violence to the expressed terms of the contract, and in accordance with the aims and purposes of such fraternal brotherhood.

Where the peculiar malady known as "color-blindness" so impairs the sight that the member of such association who is insured therein is disabled and is unable longer to continue in the train service, and is discharged therefrom on account of such defect in his vision, it will be held that he is entitled to the benefits provided by the certificate, the constitution, and by-laws and rules of the society. In such case, while the sight of the insured may not be entirely destroyed for some purposes, it will be deemed destroyed and lost as to the particular avocation of a railroad trainman, and he will be held entitled to recover upon the benefit certificate which he holds.

We are unable to say that the judgment of the district court is wrong. It appears to be right, and it is

AFFIRMED.

LETTON, ROSE and CORNISH, JJ., dissenting.

Insurance contracts which are ambiguous should be construed against the insurer, who usually prepares the contract; but there is no ambiguity in the contract under consideration. The clause under which the plaintiff claims recovery provides: "Any beneficiary member in good standing * * * who shall suffer the *complete and permanent loss of sight of both eyes* shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise."

The plaintiff's eyes became affected in some way so that he was unable to distinguish colors, a condition known as "color-blindness." In all other respects his vision seems to have been perfect. He was 27 years old and had never worn glasses, nor had the doctors recommended them. The colors he could not distinguish were red and green. He had no trouble distinguishing white and blue, and had some trouble in distinguishing yellow. He had no trouble in reading print or seeing ordinary objects. To hold that "color-blindness" is equivalent to "complete and permanent loss of sight of both eyes" is to state a contradiction in terms. The contract was not to indemnify against the loss of the use of the eyes in his employment as a railroad brakeman as the majority opinion practically holds. It seems to be a distortion of its language to so hold. To insure a person's ability to permanently continue in his particular vocation would, in a policy, require words to that effect. In the policy under consideration there is none.

The opinion is unjust to the membership. The judgment affirmed diverts from a trust fund, created by the contributions of members as indemnity for the "complete and permanent loss of sight of both eyes" and for other purposes of indemnity, the sum of $1,740. We cannot conceive that any body of men, providing for insurance,

whether they all belong to one occupation or not, or whatever the occupation, would place a man who had merely become color-blind on the same indemnity footing with the family of the brother who had been killed, or with the brother totally disabled through loss of legs or arms, or total blindness. Loss of his job by a young trainman, because of color-blindness, might be the incident that led to his financial fortune, taking him from a job that paid from $75 to $150 and putting him into an occupation that paid several times that. Certainly color-blindness bears no resemblance to total disability. Presumptively insurance aims at indemnification—compensation according to actual loss.

The cases cited in the opinion go only to the length of holding that, when a policy provides for the "loss" of an organ, liability arises when there is an entire loss of the use of the organ for all practical purposes.

FRED GREINER ET AL., RECEIVERS, APPELLANTS, V. ROSE B. LINCOLN ET AL., APPELLEES.

FILED NOVEMBER 3, 1917. No. 19692.

1. **Appeal in Equity:** TRIAL DE NOVO. "Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo*, without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank*, 99 Neb. 317.
2. **Evidence** examined, and *held* to support the finding and judgment of the district court.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Affirmed.*

Harry R. Ankeny, for appellants.

Reese, Reese & Stout, contra.

HAMER, J.

The receivers of the Buffalo Pitts Company, a corporation, are plaintiffs and appellants. At the trial in the district court there was a finding and judgment rendered in favor of the defendants, and the plaintiffs have appealed.

The action was brought on five promissory notes signed by the defendants and a real estate mortgage given by Rose B. Lincoln to secure the payment of the said notes. The notes and mortgage were each dated July 20, 1914. Three of the notes were for $100 each and two were for $150 each, aggregating $600. Each note drew interest at 10 per cent. per annum, payable annually. The mortgage was upon lot 1, block 2, in Lincoln Driving Park Second addition to city of Lincoln. The amended petition set up that no part of the debt had been paid, and contained the usual prayer for the foreclosure of the mortgage.

The separate answer of W. F. Jones admitted the execution and delivery of the notes, and set up that the Buffalo Pitts Company was, at the time of the transaction, engaged in the business of manufacturing and selling threshing machines and separators, and was well acquainted with their quality and value; that the said company sold to the defendant Jones a second-hand threshing machine which was worthless and of no value, and falsely and fraudulently represented to the defendant Jones, through its agents and representatives, that said threshing machine had just been rebuilt from the ground up, that there was not a pimple on the crown sheet, that the engine was in first-class condition, that new flues had just been installed, that it was in condition to do the work required of it by the defendant W. F. Jones, that the boiler would not leak, that the engine was sound, and that the engine would operate the separator with ease; and that all these representations were false and fraudulent, and were believed by the defendant Jones, and were relied upon by him, and that the plaintiff knew that the said representations were

false and untrue; that by reason of such representations the defendant Jones was induced to sign the said notes and deliver the same to the plaintiff.

The defendant Rose B. Lincoln signed the notes and executed the mortgage so as to become a surety for the purchaser, W. F. Jones. In her answer she set up the misrepresentations made to her by the agents of the company, and that she believed such misrepresentations, and relying upon them signed the notes and mortgaged her property to secure the debt. The defendant Jones testified that Stoll said that he was the manager of the company, and that he and Stoll looked the engine over, and that Stoll said that he would guarantee the engine to be rebuilt "from the ground up." Stoll himself testified on behalf of the plaintiff that he had told Jones that the engine was "thoroughly rebuilt from the ground up, and she is." Jones testified that the engine gave him constant trouble, and that it had not been rebuilt. He also testified that Mr. Stoll, the manager of the company, stated to Mr. Jones and Mrs. Lincoln that the engine "had all new flues." Jones also testified that the flues were not new, but that they were old; also, that he fired up the engine and ran it down off the platform at Lincoln and started to Waverly, and that when he got a short distance the other side of Havelock the flues began to leak. He testified that all leaked. Mrs. Lincoln set up the fact that she relied upon the false representations made to her by the plaintiff, and that she was thus induced to become a surety. She prayed in her answer that the notes be declared null and void, and that the title to the premises be quieted in the defendant, Mrs. Lincoln. The district court dismissed the plaintiff's case, and quieted the title to the lot in question in the defendant Rose B. Lincoln. There was also judgment for costs against the plaintiffs.

This case was heard before Judge Cosgrave of the district court for Lancaster county. While there is some conflict in the evidence, there is enough evidence to sustain the finding and judgment rendered. Judge Cosgrave

had the witnesses before him. He saw them. He had an opportunity to judge of their credibility. It is our duty to examine the evidence. We have done so. We are unable to discover prejudicial error of any kind in the proceedings and judgment of the district court. Where the evidence is conflicting, a judgment rendered by the court alone will not be set aside unless it is clearly wrong. *National Bank of Ashland v. Cooper*, 86 Neb. 792. In an appeal of an equity case, where the evidence is conflicting, the supreme court should consider the findings of the district court. *Coad v. Coad*, 87 Neb. 290; *McLaughlin Bros. v. Hilliard*, 97 Neb. 326; *Wynegar v. Dobson*, 98 Neb. 310; *Shafer v. Beatrice State Bank*, 99 Neb. 317.

The judgment of the district court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

SAM O. POPE ET AL., APPELLEES, v. ROYAL HIGHLANDERS ET AL., APPELLANTS.

FILED NOVEMBER 3, 1917. No. 19637.

1. Insurance: CONTRACT: CONSTRUCTION. In a fraternal mutual benefit insurance association, the application for membership, the certificate of insurance and the by-laws of the society constitute the contract between the insured and the society, and all are to be construed together, and, considered with other evidence in the case, to determine the rights of the respective parties.

2. ———: MUTUAL BENEFIT ASSOCIATION: MEMBERSHIP. Where a person voluntarily becomes a member of such association, he thereby assents to and is bound by the laws under which his membership is acquired.

3. ———: ———: RECOVERY OF PREMIUMS: PLEADING. A plea by such member of ignorance of such laws will be of no avail, where he attempts to recover premiums paid while engaged in an occupation prohibited by the laws of the society and collected by the society without knowledge that the member was so engaged.

4. ———: ———: ———. Where a by-law of such association provided that "a member being engaged as a saloon-keeper * * * shall exclude him from membership, annul his certificate and void all his rights as a member," and the certificate provided that if the insured should be expelled, or be or thereafter become a saloon-keeper, his certificate should immediately become void, and that all moneys paid, and all rights and benefits, if any, "which may have accrued on account of this certificate, shall be absolutely forfeited to the fraternity;" in such case the insured cannot recover premiums paid that were received by the society without knowledge on its part that the insured was engaged in the prohibited occupation.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Hainer & Craft, for appellants.

Fred W. Anheuser and *C. F. Connolly, contra.*

DEAN, J.

This action was commenced to recover $160.04 paid by plaintiff Sam O. Pope to defendants, as premiums on a fraternal beneficiary insurance certificate issued to him on July 29, 1908, by the Royal Highlanders. On July 7, 1908, the insured signed an application for membership, in which he stated, among other things, that he was a laborer, and that, if he should thereafter engage in an occupation prohibited by the society, his rights and those of his beneficiary to participate in the benefit funds of the society should thereupon cease, and the applicant, without notice, would stand suspended as a member, and that thereafter any payment of dues or monthly payments by him or any receipt for such moneys issued by any officer or member of the tributary castle to which he belonged or of the executive castle should not be binding on the fraternity. The certificate provides that if the insured should be expelled, or be or thereafter become a saloon-keeper, his certificate should become immediately void, and that all moneys paid and all rights and benefits, if any, "which may have accrued on account of this certificate shall be absolutely forfeited to the fraternity." A by-law or edict of the society provides: "That a mem-

ber being engaged as a saloon-keeper, or in the manufacture or sale of intoxicating liquors, shall exclude him from membership, annul his certificate and void all his rights as a member."

The application, the certificate and the edicts are in evidence, and together they constitute the contract between the insured and the parent society.

In their brief plaintiffs concede that Mr. Pope "engaged in the saloon business on the 1st day of January, 1910, in which business he remained until after he was formally expelled from the lodge * * * December 29, 1913." In oral argument it was also conceded by plaintiffs that all dues paid after the society discovered that the insured was a saloon-keeper were repaid to him. Plaintiffs argue that the certificate was void from the time that the insured became a saloon-keeper, and therefore the premiums paid thereafter should be repaid to him because, the policy being void, there was no consideration for the payments. They also contend, as an additional reason for recovery, that the insured testified he did not know until shortly before the suit was commenced that his engagement in the prohibited occupation made his certificate void. We do not find in the record any evidence of concealment from the insured of the conditions of his contract. From his testimony he appears to be a man of intelligence and conversant with business affairs. He voluntarily became a member of the order, and thereby assented to all the conditions of the contract in pursuance of which the certificate was issued, and he is therefore bound by its rules. In the absence of fraud or concealment he is presumed to know the conditions of his contract. Such is the general rule, and we find no reason for making an exception in the present case. The expulsion of the insured and the cancelation of his certificate seem to have been in conformity with the contract between the parties, and was not unlawful.

The weight of authority and the better reasoning seems to be against plaintiffs' contention. On the subject of mutual benefit insurance it is said in 29 Cyc. 103: "If

a member is suspended or expelled his previous payments of dues or assessments cannot be recovered back, unless the suspension or expulsion is unlawful, in which case such payments are recoverable."

It is the rule in this jurisdiction that if the insured member of a fraternal mutual benefit insurance society dies while engaged in an occupation that is prohibited by its laws, and the fact that he was so engaged was unknown to the society until after his death, and was not waived by the society, his beneficiary cannot recover on the policy, for the sufficient reason that the contract provides that in such case there shall be no recovery. *Modern Woodmen of America v. Colman,* 68 Neb. 660. It would be a strange and illogical process of reasoning that would lead to the conclusion that, while a beneficiary in such case could not recover on the policy, the insured in his lifetime might have recovered the premiums that he paid on the policy. A different situation would be presented if it were shown that the society had, or was charged with, knowledge that Mr. Pope was engaged in a prohibited occupation, and notwithstanding that knowledge it accepted and retained premiums paid by him, thereby waiving the forfeiture. *Susquehanna Ins. Co. v. Perrine,* 7 Watts & Serg. (Pa.) 348; *Knights of Columbus v. Burroughs' Beneficiary,* 107 Va. 671; *United Moderns v. Rathbun,* 104 Va. 736; *Modern Woodmen of America v. Brockenridge,* 75 Kan. 373; *L'Union St. Jean Baptiste v. Ostiguy,* 25 R. I. 478; *Simeral v. Dubuque Mutual Fire Ins. Co.,* 18 Ia. 319; *Modern Woodmen of America v. Berry,* 100 Neb. 820.

Defendants argue that there is a misjoinder of parties plaintiff and defendant; but, in view of our disposition of the case, we do not find it necessary to determine the questions submitted on that feature.

The motion of defendants for a directed verdict should have been sustained. The case is reversed and remanded for further proceedings in accordance with law.

REVERSED.

SEDGWICK, J., not sitting.

FRANK IAMS, APPELLANT, V. FARMERS STATE BANK ET AL., APPELLEES.

FILED NOVEMBER 3, 1917. No. 20007.

1. **Banks and Banking:** DEPOSITORS' GUARANTY FUND: DEPOSIT. Where money purporting to be a deposit is placed in a state bank, for which the bank issues and delivers to the purported depositor certificates of deposit in terms providing for payment of 5 per cent. annual interest, and where by an understanding between the parties the bank pays to such person a bonus of 1 per cent. above the lawful rate of 5 per cent. interest, *held*, such transaction does not constitute a deposit within the meaning of the bank depositors' guaranty act (Rev. St. 1913, secs. 280-345), but is a mere loan of money to the bank.

2. ———: ———: ———. Where such bank fails and a receiver is appointed, certificates so obtained cannot lawfully be paid out of the depositors' guaranty fund. Rev. St. 1913, sec. 306.

3. ———: ———: LIABILITY. Subsequent to the issuance of the initial certificates, which were renewed from time to time, the corporate name of the bank was changed, the bank remaining unchanged in identity and personnel and in all respects, except as to name, the same as before the change in corporate name. *Held*, that such change in corporate name in no way affected the transaction between the parties.

APPEAL from the district court for Burt county: GEORGE A. DAY, JUDGE. *Affirmed.*

John L. Webster and *William R. King*, for appellant.

Willis E. Reed, Attorney General, and *George W. Ayres, contra.*

DEAN, J.

In pursuance of a petition filed on May 24, 1916, by the attorney general and subsequent proceedings in the district court for Burt county, a receiver was appointed for the Farmers State Bank, then a failing institution at Decatur. On September 25, 1916, Frank Iams filed a petition in the case, alleging ownership of 5 certificates of deposit issued by the bank in pursuance of alleged de

posits of $12,000, and praying that his claims be allowed and paid as a preferred claim against the assets of the bank or the depositors guaranty fund. The certificates range in amount from $2,000 to $3,000 each, and except as to date and amount, necessary to conform to the fact, they are all in the following form:

"Decatur, Neb. April 16, 1916, No. 1138. This certifies that Frank Iams has deposited with Farmers State Bank two thousand dollars payable to the order of himself in current funds on the return of this certificate properly indorsed six or twelve months on demand after date with interest until maturity only at 5 per cent. per annum. This deposit is protected by the depositors' guaranty fund of the state of Nebraska.

"THEO HENNIG, V. Pres."

The attorney general filed a protest objecting to the payment of the certificates from the depositors' guaranty fund, for the alleged reason that by a fraudulent agreement between the parties the bank paid to appellant a bonus of 1 per cent. interest in addition to the 5 per cent. named in the certificates, thus creating an excessive and illegal rate, and that the certificates for that reason represent a loan by appellant to the bank, and not a deposit. Judgment was rendered denying appellant the right to participate in the depositors' guaranty fund, but the claim was "allowed as a general creditor claim against the Farmers State Bank." The petitioner has appealed.

Prior to July, 1915, the corporate name of the Farmers State Bank, the appellee herein, was Farmers & Merchants State Bank. The personnel of the bank, the identity of the corporation, and the ownership and control of the business and the assets, and liability for the debts and corporate acts remained unchanged under its new name. The certificates in suit are renewals of certificates issued by the bank in its former name of Farmers & Merchants State Bank, and any infirmity that may have been imparted to the original certificates by an unlawful act, such as an agreement for an unlawful rate

of interest, as the attorney general charges in the present case, would inhere in and vitiate the entire series of renewal certificates. The record shows clearly the payment of a bonus of 1 per cent. over the 5 per cent. allowed by statute for the use of the money of appellant that was placed in the bank while it was doing business under its former name. And it is not clear that a bonus of 1 per cent. over the lawful rate of 5 per cent. interest was not received by appellant from the bank after the certificates were renewed and while the bank was doing business in its new name. Appellant was called as a witness by the state, and, his attention being directed to three of the renewal certificates in suit, he was asked if he received "anything other than the rate stated in the certificates," to which he replied: "I may have received a present." On cross-examination he testified on this feature of the case: "I received $40 in cash from some one in a letter without anything on it. I do not know who it was from or anything about it. I can only surmise." The cashier of the bank, while it was doing business as the Farmers & Merchants State Bank and later as the Farmers State Bank, testified on the same point on cross-examination: "Q. Well, at the time you made these respective payments that you have spoken of by way of a bonus, were you at that time an officer or cashier of the Farmers & Merchants State Bank? It is the bank I want to identify. A. Yes, sir; I was. Q. And not as an officer of the Farmers State Bank? A. Yes; both. * * * Q. I will put it another way. None of these payments of a bonus in any manner or form to which you testified to, none of them were made after the dates of the issuing of these certificates of deposit by the Farmers State Bank, beginning with the one numbered 1048, dated October 14, 1915? A. I do not think I ever testified to any payment—that I made any payment as late as any of these dates." The foregoing testimony of appellant seems fairly to indicate the reception by him of a bonus from the bank after the renewal of the certificates, and the cashier's testimony, though not alto-

gether clear, may, when analyzed and considered in connection with the other testimony in the record, be construed as a failure at least to deny that a bonus was paid by him to appellant after the renewals in suit were issued.

Section 306, Rev. St. 1913, that provides for payment of interest on deposits follows: "No banking corporation transacting a banking business under this article shall pay interest on deposits directly or indirectly at a greater rate than 5 per cent. per annum. Any officer, director or employee of a bank violating the provisions of this section directly or indirectly, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the state penitentiary not exceeding three years, or both."

The payment by the bank to appellant of a bonus of 1 per cent., interest, whether made in the name of Farmers & Merchants State Bank or in the name of Farmers State Bank, was a clear defiance of the plain terms of the statute. The transaction between the parties was fraudulently conceived. It was a device intended to evade the provisions of the act. It is therefore clear that appellant's money was not a deposit within the meaning of the law. It did not partake of that part of the statutory characteristic of a deposit which provides for interest at only 5 per cent. per annum. The money that appellant placed in the bank, by whatever name it may be called, is a stranger to the act in question and cannot find asylum within its purview. The law will leave the parties where it finds them. The court properly found that appellant was only a general creditor of the bank. *Storz & Iler v. Finklestein,* 46 Neb. 577; *Gould v. Kendall,* 15 Neb. 549; Bishop, Contracts (2d ed.) sec. 1112; 10 Cyc. 155.

It may be observed that punishment by fine or imprisonment for violation of the act is by its terms con-

fined to officers, directors, and employees alone, but that question is not before us.

A change of corporate name cannot be permitted to operate to relieve the bank or appellant from the direct consequence of their joint act, nor from such liability as they may have incurred in the premises. By operation of the provisions of the statute that appellant violated, he is estopped from pressing his claim to participate in the bank guaranty fund. The act creating the depositors' guaranty fund was intended by the legislature to be a shield of protection against loss to those who in good faith deposit their money in state banks in compliance with the terms of the statute. Unless its provisions are fairly construed and impartially enforced, this salutary law might become a destructive sword in the hands of unscrupulous persons having unlawful designs on the depositors' guaranty fund.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

JOSEPH J. HAVLICEK V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1917. No. 20113.

1. **Criminal Law**: PRELIMINARY HEARING: SPECIAL APPEARANCE. Failure to give an accused person a preliminary hearing on the crime charged in an information cannot be raised by a special appearance objecting to the jurisdiction of the court.

2. ———: ABANDONMENT OF WIFE: EVIDENCE. In a prosecution for wife abandonment under section 8614, Rev. St. 1913, it is competent to prove that, subsequent to the date of abandonment alleged in the information, defendant went to another state and there procured a decree of divorce from the wife he is charged with having abandoned.

3. **Appeal**: ADMISSION OF EVIDENCE: OBJECTIONS. It is the duty of counsel to make his objections so specific that the court may understand the point intended to be raised, and, unless prejudicially

erroneous on the point presented, the admission of the evidence to which objection is offered will not be held prejudicially erroneous for some reason which counsel did not suggest at the trial.

4. **Criminal Law:** ABANDONMENT OF WIFE: PROOF. To sustain a conviction under section 8614, Rev. St. 1913, "the state must prove that the accused is possessed of money, property or other means available for the support of his wife, or, if he is without such means, that he has at least some earning capacity, and his refusal, without good cause, to maintain or provide for her." *Goddard v. State*, 73 Neb. 739. But, where it is shown that prior to his departure from home he had steady employment at remunerative wages, the state is not required to offer other proof that he had means, or that he drew a salary after his departure.

5. ———: ———: DEFENSE. In such case, his lack of means, or failure to secure employment, is matter for his defense.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Joseph T. Votava, for plaintiff in error.

Willis E. Reed, Attorney General, and *John L. Cutright, contra.*

MORRISSEY, C. J.

Defendant prosecutes error from a judgment of the district court for Douglas county, wherein he was sentenced to a term of one year in the penitentiary for wife abandonment.

A complaint was filed before the county judge September 28, 1915. Hearing was continued with the consent of defendant, until November 17, 1915. Thereafter it was continued from time to time without his consent until June, 1916, when a hearing was had, and defendant held for trial in the district court. Upon being arraigned in the district court he filed a special appearance objecting to the jurisdiction of the court. The special appearance was overruled, and a plea of not guilty entered. The point is made that the examining magistrate had lost jurisdiction, and that no preliminary hearing had been accorded defendant. But we are not called upon to determine the question. It was not properly presented by the special appearance. In

White v. State, 28 Neb. 341, it was held that a district court had no jurisdiction to try an accused person until a preliminary examination had been held according to law. But this holding is expressly overruled in *Coffield v. State,* 44 Neb. 417. The court had jurisdiction. The special appearance was properly overruled. No motion to quash or plea in abatement was filed, and all defects were waived by pleading to the general issue.

It is next urged that the trial court erred in the admission of evidence. Defendant took his departure from Omaha, where he and his wife resided, July 30, 1913, and the information alleged the abandonment as of that date. On the trial letters written by defendant to his wife after his departure were introduced in evidence. After she had testified to the receipt of the letters, she was asked if he had obtained a divorce from her. Objection was made to that testimony as incompetent, immaterial and irrelevant. The objection was overruled, and she answered in the affirmative. She was next asked as to the date when she received this information, and, over the same objection, was permitted to answer. The inquiry being further pressed, the trial court interrupted and remarked that the state could not prove a divorce by hearsay testimony. From the form of the objections and the argument contained in the brief it is clear that counsel did not object to the questions the witness was permitted to answer because they called for hearsay testimony or because her statement was not the best evidence, but objected on the theory that proof of what defendant did after the date fixed in the information was incompetent. In overruling the objection the trial court was, as he supposed, holding that proof of divorce was competent, and in this he was clearly right.

It is the duty of counsel to make his objections so specific that the court may understand the point intended to be raised, and, unless prejudicially erroneous on the point presented, the admission of the evidence to which objection is offered will not be held prejudicially erroneous for some reason which counsel did not suggest at the trial.

"Unless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in the court of appeal." 5 Jones, Commentaries on Law of Evidence, sec. 893.

It is said in defendant's brief "the only question is: Was the testimony prejudicial?" Without undertaking to review the testimony at length or set out defendant's letters, which are copied in the bill of exceptions, we will say that his general course of conduct was such that but one conclusion could be reached, and that was the conclusion reached by the jury. The reference to the divorce could add little or nothing to the proof furnished in his own handwriting.

It is argued that, in order to sustain a conviction, the state must prove that the accused is possessed of means available for the support of his wife, or, if he has no such means, he has at least some earning capacity, and is refusing, without good cause, to maintain or provide for her. This is the rule laid down in *Goddard v. State,* 73 Neb. 739, and we adhere thereto; but the record does show affirmatively that prior to his abandonment of his wife he was earning $185 a month; that he went away and left her with only $25 and some household furniture, the value of which is not shown, and that he absented himself for more than two years without contributing anything to her support. He did not testify in his own behalf, and no justification or excuse for his conduct is given. It is argued, however, that from his letters, which were offered by the state, it may be inferred that he was without employment, but no attempt is made to show that he might not have returned to his wife and continued at his usual employment. A husband may not leave his wife dependent upon her own efforts for support while he takes a two-year jaunt about the country, and then justify his failure to contribute to her support by saying that he has been without employment. Where it appears that prior to his going he had

steady employment, and no satisfactory reason is given for his quitting his work and going away, the state is not required to offer proof that he had means, or that he was drawing a salary after his departure. His lack of means, or failure to secure employment, is matter for his defense.

The court imposed the maximum sentence of one year's confinement in the penitentiary, and we are asked, in case of affirmance of the judgment, to exercise the power granted under section 9179, Rev. St. 1913, and reduce the sentence. The power to reduce the penalty is given to this court when, in its opinion, the sentence imposed is excessive. Further than a mere statement that the penalty imposed is the maximum, that the defendant anl his wife were without children, and that she was able to support herself, no reason is assigned for making a reduction of the sentence. No palliating circumstances are shown, or atonement promised, and he will not be heard to complain that the maximum penalty has been imposed.

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

IN RE ESTATE OF ENOS E. GROBE.
MATILDA GROBE ET AL., APPELLANTS, V. B. B. CROWNOVER, EXECUTOR, APPELLEE.

FILED NOVEMBER 17, 1917. No. 20221.

1. Wills: ELECTION: EFFECT. When the husband dies testate, seised of real estate which is the family homestead, and the widow elects to take under the statute and renounce the provisions made for her in the husband's will, the court will first award the widow her homestead interest in the homestead property not subject to debts of deceased, under section 3092, Rev. St. 1913, and then award her the share of an heir in the remainder of the property of the estate under section 1265, Rev. St. 1913.

2. ———: ———: ———. Where a widow elects to renounce the provisions made for her in the will of her deceased husband and take under the statute, such election does not render the will inoperative. As between other persons it will be enforced as nearly as may be in accordance with the intention of the testator.

APPEAL from the district court for York county: EDWARD E. GOOD, JUDGE. *Affirmed.*

Sandall & Wray and *W. L. Kirkpatrick,* for appellants.

G. M. Spurlock, contra.

MORRISSEY, C. J.

Enos E. Grobe, a resident of York county, died testate, November 7, 1914, without issue, leaving surviving him his widow, his father and mother as heirs at law, and five brothers and sisters named as devisees in his last will and testament. Decedent in his will provided first for the payment of his debts, then bequeathed a legacy of $2,500 to his widow, and the remainder of the estate he bequeathed and devised, one-half to his widow and one-half to his brothers and sisters. Within the proper time the widow filed an election to take under the statute. The only real estate of which decedent died seised was an 80-acre farm in York county, which at the time of his death was occupied by the decedent and his wife as their homestead. Decedent's debts were in such an amount that after the personal property was exhausted there remained unpaid the sum of $3,278.97. Under proceedings brought by the executor in the district court for York county, the real estate was sold to pay these debts. His action in this regard is not questioned, and this appeal is taken from an order distributing the proceeds remaining after the payment of the debts.

The property sold for $11,280. After the payment of the debts the executor brought $8,001.03 into court. The widow filed an application for one-half of the gross proceeds of the land, claiming that she took such interest under section 1265, Rev. St. 1913, the inheritance law of 1907, and asking that the present value in money of her homestead life estate in the other half of the fund be computed and paid to her.

The father and mother of decedent ask that the fund remaining after the widow's rights are satisfied be paid to

them as decedent's heirs at law. Their application presents these points:

(a) That by section 3092, Rev. St. 1913, the widow is entitled to a life estate only in said homestead proceeds of $8,001.03, and is not an "heir" of her deceased husband, and does not inherit anything in the homestead remainder under the King inheritance law.

(b) That the present value of the widow's life estate in the $8,001.03 is the sum of $4,500 and no more, and that the remainder $3,501.03, should be distributed to the father and mother as heirs.

(c) That by her election to take under the statute the entire will fails and cannot be carried out, and after the widow's life estate is deducted the remainder should be distributed between the father and mother as heirs.

(d) That the $2,500 legacy lapsed after the widow's election, and the same passed to the father and mother as heirs.

The residuary devisees ask that the money remaining after satisfying the widow's rights under the statute be paid to them under the provisions of the will. Their application presents the following points:

(a) That by section 3092 the widow is entitled to a life estate only in the $8,001.03, and is not an "heir" of her deceased husband, and does not inherit anything in the homestead remainder under the King inheritance law.

(b) That the present value of the widow's life estate in the $8,001.03 is the sum of $4,500 and no more, and that the remainder $3,501.03, should be distributed among the devisees under the will, share and share alike.

Both the father and mother as heirs and also the devisees of decedent, in their several applications, take issue with the widow, both as to the nature and amount of her interests in the land and in the fund before the court, claiming that she took no interest in fee of said lands, but only a life estate in the remainder of $8,001.03.

Before submitting the issues thus joined to the district court, the several parties in interest stipulated that, whatever the several interests of the parties might be in the

subject-matter, such interests were to be computed and paid to them in money so that the division of said fund should be final. The trial court decreed: That the debts in the sum of $3,278.97 should be allowed against the estate; that the widow takes under the law and by descent one-half of said residue, to wit, one-half of $8,001.03; and that she has a life estate of homestead in the other half of said residue of the proceeds of said sale; that the present value of said life estate should be computed at 5 per cent., or upon an annual income of $200, amounting to $2,851.03; and directed that $6,851.03 be paid to the widow, and ordered the remaining $1,150 distributed under the will among the brothers and sisters.

The widow contends that the court erred in finding that she was not entitled to one-half of the gross proceeds of the sale of the land, and in holding that the debts should first be paid before any distribution was made, and she further insists that she is not only entitled to one-half of the gross amount of the sale, but, in addition thereto, she is entitled under the homestead law to a life estate in all the remainder. She further contends that the court erred in finding that either the heirs or residuary devisees should share in the fund.

The father and mother, as heirs at law, complain because the court found the widow was an "heir" of the decedent, and has an interest in the estate under the inheritance act of 1907 (Rev. St. 1913, sec. 1265), and that she had an interest other than a life estate of homestead. They also say the court erred in giving any part of the estate to the residuary devisees under the will, and claim that the whole will failed because the widow elected to take under the statute. The residuary devisees join with the father and mother in saying that the court erred in finding that the widow was an "heir" under the inheritance act.

The money in the hands of the executor is the proceeds of the sale of the farm which was the homestead of decedent and his wife. We then have the questions: How did the same vest on his death? What interest vested in the

widow? What interest vested in the devisees? What interest vested in the heirs?

The homestead statute of 1879 (Rev. St. 1913, sec. 3092) provides: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

The inheritance statute of 1907 (Rev. St. 1913, sec. 1265) provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, or by the deceased while the husband or wife was a non-resident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead in the manner following: * * * Fourth. One-half to the husband or wife, if there be no children nor the issue of any deceased child or children surviving."

The decree of the trial court permits the widow to take in fee one-half of the proceeds of the property remaining after the satisfaction of the debts under section 1265, and gives her a life estate in the remaining one-half under section 3092.

The decedent's statute does not change the homestead statute at all, and these two statutes may be harmonized by holding that the homestead law gives the residuary estate to those persons to whom the law gives property that is not a homestead. The surviving spouse is not an heir under the ancient definition of the term, but takes the property of the deceased spouse whenever the conditions are such that an heir would take. Under section 1265 the ancient right of dower is enlarged into a contingent interest in the fee. On the death of the husband the

widow becomes the owner, where there are no children, of a half interest in the property that is not a homestead, and because she takes by operation of law, and not strictly as an heir, she is not excluded from taking under the homestead law. There is no inconsistency between the statutes. In the instant case it appears to make no difference whether the widow first takes under the homestead statute or under the inheritance statute. The result is the same regardless of the order in which these statutes are applied. If any difference would result it would seem that the homestead statute ought to be first applied. Under the homestead statute the widow is entitled to the present worth of her life estate in the property, after the debts are paid, and she is entitled to half of the remainder under the inheritance statute.

Counsel representing her complain of the rate at which the present worth of her life estate in the homestead was established, but no facts are pointed out to show that the district court erred in this respect, and his finding in that regard will not be disturbed.

The law is well settled that the renunciation of a will by a widow will not be allowed to break the testamentary plan further than is absolutely necessary.

"Where a widow, without regard to the provisions of the will of her deceased husband, elects to take under the law of descents and distributions, such election does not render the will inoperative. As between other persons the will will be enforced as near in accordance with the intention of the testator as it can be." *Pittman v. Pittman,* 81 Kan. 643, 27 L. R. A. n. s. 602.

After the widow's portion is set aside, the estate of decedent is not left in such condition that the remaining provisions of the will cannot be carried out according to the testator's intent.

The record is free from error, and the decree of the district court is

AFFIRMED.

CITY TRUST COMPANY OF OMAHA ET AL., APPELLANTS, v. DOUGLAS COUNTY ET AL., APPELLEES.

FILED NOVEMBER 17, 1917. No. 19606.

1. **Taxation:** CONSTITUTIONAL PROVISION. By the first clause or division of section 1, art. IX, of the Constitution, the public revenues are required to be provided by the levying of a tax by valuation, "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises."
2. ———: UNIFORMITY. The rule of uniformity therein prescribed inhibits the legislature from discrimination between taxpayers in any manner whatever.
3. ———: MORTGAGES: WHERE TAXED. Where the mortgagor of real estate has not agreed to pay the taxes assessed upon the mortgage interest (which section 6349, Rev. St. 1913, declares to be an interest in real estate), individual and corporation holders of mortgages alike must pay taxes upon mortgages held by them respectively in the county in which the mortgaged land lies. Since discrimination between taxpayers is not permitted in taxation by valuation, neither an individual nor a corporate holder of such mortgages is subject to assessment or taxation of the mortgages in the county of his or its residence or domicile.
4. ———: ASSESSMENT: SHARES OF STOCK: DOMESTIC COMPANIES. Construing section 6313, Rev. St. 1913, which provides that a person is required to list as personal property "shares of joint stock or other companies, when the capital stock of such company is not assessed in this state," it is *held*, that this does not require the listing and assessment by the holder of shares of a domestic corporation when its capital stock is assessed in the state.
5. ———: ———: ———: ———. Since under the provision of the Constitution before mentioned the same rule must be applied to corporations as to individuals, with respect to taxation by valuation, neither an individual nor a corporation is compelled to list for taxation shares of such domestic corporations owned by either of them, and if the value of such shares has been included in the valuation of the capital stock of a trust company it is entitled to have such value deducted in determining the actual value of such stock for the purpose of taxation.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed, with directions.*

McGilton, Gaines & Smith, for appellants.

George A. Magney, Ray J. Abbott and *J. M. Fitzgerald, contra.*

LETTON, J.

The board of equalization of Douglas county fixed the valuation of the capital stock of the City Trust Company, a corporation, for the purpose of assessment at $318,120. On appeal by the corporation and by O. C. Redick and W. G. Silver, stockholders, the district court set aside this valuation and found that the capital stock should be valued for assessment purposes in the sum of $208,120, being divided into 2,000 shares. The City Trust Company and the stockholders named appeal from this judgment.

The evidence shows that among the assets of the City Trust Company are included $39,500 of real estate mortgages upon land in Nebraska, and 865 shares of stock in a corporation known as the City National Bank Building Company worth from $110,000 to $115,000. The appellants insist that the $39,500 invested in Nebraska mortgages and the $110,000 to $115,000 stock in the City National Bank Building Company should be deducted from the value of its capital stock for the purpose of assessment. They argue that the Constitution of the state requires that every person or corporation shall be assessed and taxed in proportion to the value of his, her or its property and franchises; that there can be no discrimination between a corporation and an individual; that a trust company must list its property the same as an individual and it must be valued as though owned by an individual. It is then argued that since real estate mortgages, under section 6349, Rev. St. 1913, are declared to be interests in real estate, and the amount and value of mortgages on real estate is assessed and taxed to the mortgagee or his assigns, an investment in real estate mortgages cannot be considered in determining the value of capital stock, as, otherwise, there would be double taxation and a violation of the provisions of the Constitution. The record fails to show that the owner of the mortgaged land has agreed

to pay the taxes upon the mortgage interests, and the mortgages are properly taxable to the corporation or individual holding the same.

Under the former system in this state, if either an individual or a corporation loaned money upon a farm, the fact that the owner was indebted and that that indebtedness was secured by a mortgage on the farm was not taken into consideration. A farm worth $20,000 might be incumbered for $10,000, yet the owner of the land was required to pay a tax upon the entire value of the land, while the owner of the mortgage, whether a person or a corporation, if a resident of Nebraska, was required to return for assessment the amount of his investment in the mortgage. The taxing body, therefore, imposed taxation to the amount of $30,000, although there was only $20,000 of actual value in the farm. This was believed to be unjust, and in 1911 the legislature enacted chapter 105, Laws 1911, providing that mortgages on real estate in this state should be considered an interest in the land to the extent of the debt for the purpose of taxation, and should be assessed to the mortgagee (unless the mortgagor agreed in the mortgage to pay the tax thereon), and the remaining value of the land be assessed to the title holder. In *First Trust Co. v. Lancaster County,* 93 Neb. 792, construing this law, together with section 56 of the revenue act (Comp. St. 1911, ch. 77, art. I), which provided: "Whenever any such bank, association or company shall have acquired real estate or other tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such association or company"—it was held that such mortgages, being "assessed separately," fell within the provisions of this section and should be deducted from the value of the capital stock.

After the holding in the *First Trust Company* case, the legislature of 1915 amended this section. Laws 1915, ch. 108. The principal change made was the addition of the following proviso: "Provided mortgages, trust deeds and all other liens or interests in real estate less than a fee

title and held as security for loans shall not be considered or assessed as part of the capital stock for purposes of taxation, and shall not be deducted from the capital, surplus or undivided profits."

Under section 1, art. IX of the Constitution, each person and corporation shall pay a tax in proportion to the value of the property owned by each, but the value is to be ascertained in such manner as the legislature shall direct. The property of individuals is valued and assessed directly, but the property of such corporations, except that which is separately assessed, is taxed indirectly by finding the value of each share of stock, requiring the corporation to pay the tax on the shares, and giving it a lien on the stock for the taxes paid. Rev. St. 1913, sec. 6343; Laws 1915, ch. 108. The result is the same as if the property of the corporation was directly assessed. Where the mortgagor has not agreed to pay the tax, the mortgage owner, whether corporation or individual, is compelled to pay it where the land lies. If the individual cannot be taxed at his place of residence on the value of the mortgages in his hands, neither can the corporation or its stockholders.

The provision is that mortgages "held as security for loans shall not be considered or assessed as part of the capital stock." It is also required that they "shall not be deducted from the capital, surplus or undivided profits;" that is, mortgages shall not be included as part of the capital stock and shall not be deducted from the capital. If not included, how can they be deducted? If not to be *considered or assessed,* then the $39,500 of mortgages returned should have been excluded from consideration by the assessor, the board of equalization, and the district court, and the value of the capital stock reduced accordingly. This, in the case of mortgages where the mortgagor has not agreed to pay the tax, puts individual and corporation mortgage holders on a parity and each pays in proportion to the value of his or its property. Where the mortgagor agrees to pay the tax a different condition may arise if the individual mortgage owner is assessed at his place of residence on the value of the mortgage he holds.

In such a case, if the corporation is under no duty to return its mortgages for taxation, there would seem to be a discrimination in its favor, though this is not before us and we do not so decide. As to mortgages which do not contain such an agreement, the amendment does not change the actual result.

Should the value of the capital stock in the corporation which owns and holds the City National Bank building also be deducted?

Section 6313, Rev. St. 1913, provides, in substance, that each person must list, among other items of personal property, "moneys, credits, bonds, or stocks, shares of joint stock or other companies, *when the capital stock of such company is not assessed in this state.*" Section 6314 requires that the capital stock of corporations "shall be listed and taxed in the county, precinct, township, city or village, and school district where the principal office or place of business of such corporation or person is located within this state." This tax is assessed and collected in the same manner as specified for banking corporations by requiring the corporation to pay the tax upon the shares. *State v. Fleming,* 70 Neb. 529. Such shares in the hands of individuals may not again be assessed and taxed, and since like treatment must be accorded to corporations, such shares are not assessable or taxable in the hands of a corporation. Having once been taxed, their value should be deducted from the value of the capital stock.

Since the recent amendments, the statutory provisions are confused and hard to construe; but, bearing in mind the fundamental provision that each individual and corporation when taxed under the first provision of section 1, art. IX of the Constitution, must pay a tax by valuation in proportion to the value of their respective properties that construction should be adopted which places all upon the same plane. To require more than this is both unlawful and unjust. To construe the law as contended for by the defendant would make it discriminatory and violative of the Constitution. *State v. Poynter,* 59 Neb. 417, 429, 430. The assessment should be reduced as indicated.

What has been said with reference to equality in the taxation of corporations and individuals has no reference to taxes which may be imposed upon corporations under the second provision of section 1, art. IX, Const. As to such taxes uniformity as to the class taxed is the sole requisite.

The judgment of the district court is reversed and the cause remanded, with directions to allow the deductions of the value of the mortgages and of the shares of stock.

REVERSED.

HAMER, J., not sitting.

HIRAM E. WALDO, APPELLANT, V. CHARLES W. LOCKARD ET AL., APPELLEES.

FILED NOVEMBER 17, 1917. No. 19684.

1. **Appeal:** SUPERSEDEAS: LIABILITY OF OBLIGOR. In an action on a supersedeas bond to "abide and perform the judgment or decree rendered or final order which shall be made by the supreme court in the case," defendants are not liable for rentals and interest, where the superseded judgment does not require appellant to pay them.
2. **Specific Performance:** DECREE: RES JUDICATA. In a suit for specific performance, all damages growing out of defendant's breach of contract are litigable, and separate subsequent actions to recover different elements of such damages for the same breach cannot be maintained.
3. ———: ———: ———. After full satisfaction of a decree requiring defendant to specifically perform a contract to transfer real estate and personal property to plaintiff, the latter cannot, on account of the same breach, maintain a separate action to recover rents and interest for detention of the same property pending litigation.

APPEAL from the district court for Wheeler county: JAMES R. HANNA, JUDGE. *Affirmed.*

H. C. Vail, for appellant.

Prince & Prince, contra.

ROSE, J.

This is an action on a supersedeas bond. The trial court sustained a demurrer to plaintiff's petition. From a judgment of dismissal plaintiff has appealed.

In the district court for Wheeler county plaintiff prevailed in a former suit—specific performance of an exchange contract obligating defendant Lockard to transfer to plaintiff both real estate and personal property. From the decree in favor of plaintiff for specific performance, Lockard appealed and executed a supersedeas bond to "abide and perform the judgment or decree rendered or final order which shall be made by the supreme court in the case." Upon a trial of the appeal, the superseded judgment was affirmed. *Waldo v. Lockard,* 96 Neb. 490. After the affirmed decree had been satisfied according to its terms, plaintiff brought this action on the supersedeas bond to recover from Lockard and his surety interest on the value of the personal property and the rental value of the realty pending the appeal. The decree for specific performance did not require the payment of such interest and rental pending the appeal. These items were, therefore, not protected by the supersedeas bond.

It is argued, however, that the petition in the action on the supersedeas bond is sufficient to charge Lockard with a common-law liabilty for interest and rentals. This position is also untenable. The original suit was one in equity for specific performance. Plaintiff prevailed because Lockard made and violated an agreement to transfer to the former personal property and real estate. There could have been no decree in favor of plaintiff in the action for specific performance without a failure on the part of Lockard to comply with his agreements. All of the damages growing out of his breach of contract were litigable in the original suit in equity. The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract. It follows that the petition in the action on the supersedeas bond was demurrable.

AFFIRMED.

LETTON, J., dissents.

MATHILDA FLAXEL, APPELLEE, V. FRANK FLAXEL, APPELLANT.

FILED NOVEMBER 17, 1917. No. 19689.

1. **Divorce:** PLEA IN ABATEMENT. In an action for divorce the defendant may plead in abatement another action pending in a court of competent jurisdiction between the same parties and for the same cause, and when so pleaded the court has jurisdiction to try and determine that issue.
2. ———: ———? FAILURE TO PLEAD. If the husband, as defendant in such action, fails to so plead the former action, and fails to answer or defend against a motion for suit money of which he has due notice in the second action, a final order of the court for the payment of a necessary and reasonable amount as suit money will not be reversed upon appeal.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Lowell L. Walker and *C. N. McElfresh,* for appellant.

Albert & Wagner, contra.

SEDGWICK, J.

The plaintiff began this action for divorce and alimony on the 8th day of May, 1915, in the district court for Platte county. Summons was issued to the sheriff of Butler county, where the defendant resided, and was served on the defendant on the 12th day of May, 1915. Also on the 12th day of May the plaintiff caused to be served upon the defendant a notice of the filing of her petition, and that on the 22d day of that month she would apply to the district court for Platte county for an order for temporary alimony and suit money in said cause. The application for alimony and suit money was heard on the 29th day of May, and the court ordered that the defendant pay the plaintiff the sum of $50 for suit money, and the further sum of $15 a month for maintenance, "payable June 1, and on the 1st of each succeeding month, during the pendency of this action." Afterwards on the 3d day of June,

the defendant filed in this case a paper which he styled "Special Appearance of Defendant." This paper was duly verified, and alleged that he had begun, on the 19th day of April, 1915, an action in the district court for Butler county against the plaintiff herein for a divorce, and that the plaintiff, as defendant in that action had entered her voluntary appearance therein, and that on the next day the plaintiff and defendant entered into a written agreement whereby it was agreed that this plaintiff, as defendant in that action, should be paid by the plaintiff therein, "in full of any and all allowances, suit money and alimony, the sum of $125," and that on the 26th day of June, 1915, he paid to the plaintiff the sum of $100, being the balance in full of the said $125 agreed upon; $25 thereof having been before that time paid. In his so-called special appearance he asked that this action in Platte county be dismissed, and that the order made therein for suit money and temporary alimony be set aside. The court treated this paper as a "special appearance and plea in bar," and dismissed this action, and modified the order for temporary alimony, but refused to vacate the order for the payment of $50 suit money. The defendant has appealed, and now insists that the order for suit money was without jurisdiction and should be reversed.

When two actions are pending in different courts of competent jurisdiction between the same parties and for the same cause, the pendency of the first action will be sufficient ground for a plea in abatement to the second action, and if final judgment is entered upon the merits in the first action, such judgment will be a bar to further proceedings in the second action. The pendency of the first action is a fact which may be pleaded in bar or in abatement to the second action, and when so pleaded the court has jurisdiction to try and determine that issue. It cannot therefore be said that the court did not have jurisdiction to enter the order for suit money upon motion and due notice to the defendant. He suggests that, if the court in one county has jurisdiction to entertain an action where another action between the same parties and for the same

cause is pending in another county, this plaintiff "might have gone into each and every judicial district in the state of Nebraska and repeated the performance." But the law does not allow such vexatious litigation, and furnishes ample remedies if it is attempted.

When the defendant was served with summons and notice of the motion for alimony and suit money in this case, he failed to inform the court of the pendency of a prior action, but, instead, undertook to obtain a judgment in his prior action before the court in Platte county should be aware of the existence of such action. He seems to have had the mistaken notion that, if he obtained a decree in Butler county before any final decree was entered in this action in Platte county, the court in this action would be without jurisdiction from the beginning. If he had defended against the motion for alimony and suit money in this case, and had made it appear to the trial court that this plaintiff was not acting in good faith in the matter, and that he had paid, or was ready to pay, suit money and alimony in his action pending in Butler county, the trial court undoubtedly would have refused to enter any order for alimony and suit money in this case. There is no doubt of the jurisdiction of the court at the time that the order for alimony and suit money was made to enter such order, and, as the case then appeared upon the record, it was a suitable and proper order to make. It was this defendant's own fault that made such order necessary, and he is not entitled to have it set aside. The trial court apparently modified its former order, and in the final order adhered to its former decree only so far as it required the payment of $50 suit money, which was entirely justified by the record herein.

The judgment of the district court is

AFFIRMED.

JOHN P. MCCULLOUGH, APPELLEE, V. ST. EDWARD ELECTRIC COMPANY, APPELLANT.

FILED NOVEMBER 17, 1917. No. 19706.

1. **Husband and Wife:** ACTION FOR DAMAGES: PARTIES. The interest of a wife in the real estate of her husband, other than the homestead, under section 1265, Rev. St. 1913, is not such as to require that she be made a party in an action by the husband against a corporation with the right of eminent domain to recover damages for the taking of the land or for injury thereto in the construction of a public improvement.
2. ———: ———: ———. In such case the husband in his own right can recover the damages caused to the land by such taking.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Albert & Wagner and *F. D. Williams,* for appellant.

H. C. Vail, J. A. Price and *A. E. Garten, contra.*

SEDGWICK, J.

The defendant, St. Edward Electric Company, constructed a dam across a stream of water called Beaver river in Boone county, and the plaintiff brought this action in the district court for that county alleging that the construction of the dam caused the waters of the river to overflow his land and damage the same. The defendant denied that the plaintiff's land was damaged by the construction of the dam, and contends that the plaintiff's wife was a necessary party to the suit. This latter contention was overruled by the court and a trial was had resulting in a judgment for the plaintiff, from which the defendant has appealed.

The principal question discussed in the briefs is whether the wife under our statute has such an interest in the land as to make her a necessary party to the suit. It is suggested in the defendant's brief that the land in question was the homestead of the parties; but this is not discussed, and it would appear from the record that the case must be determined upon the theory that the land is not a home-

stead. Our statute of descent provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, or by the deceased while the husband or wife was a non-resident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead;" one-fourth, one-third, or one-half to the surviving husband or wife, depending upon the number and parentage of the children. Rev. St. 1913, sec. 1265.

In condemnation proceedings the owners of property must be paid or secured before the property can be taken. "All parties having an interest in the land are 'owners' within the meaning of the statute." *State v. Missouri P. R. Co.*, 75 Neb. 4. That case and the cases cited and quoted from in the opinion were all considering a fixed legal interest, as a lien of a mortgage or for taxes. The question in the case at bar is whether the wife has such an interest in the real estate of the husband, other than the homestead, as to make her a necessary party to such proceedings. This right of the wife is a peculiar one under the statute. She takes by descent, but is not technically an heir in the sense that a conveyance by her husband would defeat her right. She takes the property of her husband whenever the conditions are such that an heir would take, and the husband cannot defeat her claim by his voluntary conveyance. The right is substituted for the right of dower and is in many respects analogous to that right. An owner whose real estate is taken by a corporation having the right of eminent domain can without condemnation proceedings maintain an action against such corporation for the value of the land so taken. So far as such action is for damages for land taken or injured by the proper construction of a public improvement, the right of action accrues when the land is taken, and such action can only be maintained within the

statute of limitations. Under the statute of descent the wife's right in the real estate of the husband is contingent upon her surviving him. She has no interest in such real estate that she can dispose of by will or that her heirs will inherit unless she survives her husband. If we should hold that by the taking of the land her interest in the real estate would be damaged so as to give her a right of action, that interest might afterwards be entirely annulled by her decease before that of her husband, and, if she delays action until her right becomes fixed by her husband's decease, the statute of limitations may have intervened. In 10 R. C. L. 215, it is said: "The right to compensation is a personal one and does not run with the land, and if the owner dies after the taking but before receiving compensation, the right to the money passes to his personal representatives and not to his heirs or the devisees of the land; but if the land is taken during the owner's lifetime the personal representatives are entitled to the condemnation money."

In *Haggerty v. Wagner,* 148 Ind. 625, the supreme court of that state said: "Where real estate is appropriated upon compensation in the exercise of the power of eminent domain, or in case of the dedication of lands of the husband to public use in making highways, canals, railroads, streets and the like, the inchoate right of dower, or its substitute, the inchoate right of the wife to one-third in fee simple in her husband's lands, is extinguished without her joining in any deed therefor, or being made a party thereto in any manner or form."

In our state the question is new, and not without difficulty. We conclude that while the husband is living the interest of the wife in his real estate, other than the homestead, is not such as requires that she be made a party to an action of this kind, and that the plaintiff herein can recover the entire damage to the land by the taking complained of.

AFFIRMED.

STATE, EX REL. ERNEST A. CALLING, APPELLANT, V. O. D. SMITH, APPELLEE.

FILED NOVEMBER 17, 1917. No. 20057.

1. Counties: COMMISSIONERS: TERM. To comply with the constitutional provision that elections shall be on the even-numbered years, the legislature has fixed the term of county commissioners at four years and named the specific years that shall constitute such terms hereafter. Rev. St. 1913, sec. 1955.
2. ———: ———: ELECTION. That section provides that, in counties having three commissioners, "two commissioners shall be elected in the year nineteen hundred and fourteen and every fourth year thereafter," and one "shall be elected in the year nineteen hundred and sixteen and every fourth year thereafter," but it does not forbid the election of more than one in the year 1916, if the terms of two commissioners have expired or will expire in the succeeding January. In that case two commissioners should be elected.

APPEAL from the district court for Dawson county: HANSON M. GRIMES, JUDGE. *Affirmed.*

H. D. Rhea and *Wilcox & Halligan,* for appellant.

George C. Gillan, E. A. Cook and *W. M. Cook, contra.*

SEDGWICK, J.

Dawson county is not under township organization, and has three commissioner districts, numbered respectively, 1, 2, and 3. The relator was elected commissioner for the third district in the fall of 1912, his term beginning in January, 1913, and he concedes that he could not, by virtue of that election, hold longer than until January, 1917; but he contends that he is entitled to hold over because there was no valid election of a successor. At the election in 1916 the respondent was elected county commissioner for the third district. The contention is that this election is invalid and the respondent is not entitled to serve because a commissioner was also elected at the same election for the first commissioner district, and the statute (Rev. St. 1913, sec. 1955) provides: "In counties not under township organiza-

tion having * * * three commissioners, two commissioners shall be elected in the year nineteen hundred and fourteen and every fourth year thereafter, and one commissioner shall be elected in the year nineteen hundred and sixteen and every fourth year thereafter." The relator construes this statute to be an absolute prohibition, and that, as the election of the commissioner of the first district was clearly valid, no more than one commissioner could be elected in that county at that election, and the alleged election of the respondent was therefore invalid. If we should give this statute that construction, the result would be embarassing to all counties not under township organization until the statute could be changed. If a commissioner should die, or be removed from office soon after taking the office, no successor could be elected under such construction of the statute until the four years' term was completed. This is clearly not the meaning of the statute. It provides affirmatively that two shall be elected in 1914 and every fourth year thereafter, and one shall be elected in 1916 and every fourth year thereafter, but does not forbid the election of more than one in the year 1916 if, because a vacancy has occurred or for any reason, there are two commissioners whose terms for which they were elected expire before or in the succeeding January. The argument that there was no vacancy because the relator was entitled to hold over until January, 1917, is irrelevant. Under the constitutional amendment elections are to be held on the even-numbered years. To comply with this provision it was necessary that the term of office of county commissioner should be for an even number of years. To accomplish this change the statute was enacted fixing the terms of two commissioners, in counties having three, for the four years beginning in January, 1915, and every fourth year thereafter. Their election was to be in 1914 and every fourth year thereafter. The terms of one commissioner are for the four years beginning in January, 1917 and every fourth year thereafter, the election being in 1916 and every fourth year thereafter. Under the statute the four years' term for district No. 3 began in Janu-

ary, 1915, and will end in January, 1919. The relator has held two years of his successor's term (*Calling v. Gilland*, 97 Neb. 788), and respondent's term will expire in January, 1919. His successor should be elected at the fall election in 1918. Therefore relator's successor was properly elected at the election of 1916 for the remainder of the term expiring January, 1919, as in others cases where the term of a holding officer expires in or before January after the regular election. The term of office for districts No. 2 and No. 3 began in January, 1915, and will end in January, 1919. The respondent was elected for the remainder of this term in district No. 3. In 1918 commissioners will be elected for the regular four years' term beginning in January, 1919, for districts No. 2 and No. 3.

The trial court correctly found for the respondent and dismissed the relator's case, and the judgment of the district court is

AFFIRMED.

MICHAEL CAVEY, APPELLEE, v. THOMAS REIGLE, APPELLANT.

FILED NOVEMBER 17, 1917. No. 20202.

1. Counties: COMMISSIONERS: ELECTION. In a county having three commissioner districts, if the full term for which the commissioner in one district was elected would expire in or before January, 1917, his successor should have been elected in the 1916 election, if two commissioners had been elected in 1914 and duly qualified and were holding the office.

2. ———: ———: TERM. In such counties the official term fixed by the statute is four years from January, 1915, for two commissioners, and four years from January, 1917, for one commissioner, and succeeding terms will be for four years from the end of the terms which precede them.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Reversed and dismissed.*

A. E. Garten, O. M. Needham and *Prince & Prince,* for appellant.

Albert & Wagner and *Vail & Flory, contra.*

SEDGWICK, J.

The plaintiff Cavey was elected to the office of county commissioner for the first commissioner district of Boone county in the year 1912, and took the office in the following January. Boone county is not under township organization and has three commissioner districts. The defendant Reigle was elected county commissioner for that district at the election in 1916, and duly qualified and claimed the right to hold that office for the term beginning in January, 1917. The other defendants are the two remaining county commissioners, and the plaintiff brought this action in the district court for Boone county to restrain the defendant Reigle "from presenting himself before the commissioners of the said county as a member of said board, from taking or attempting to take his seat as a member thereof, and from discharging or attempting to discharge any of the duties of the said office," and to restrain the other commissioners "from recognizing the said Reigle as a member of said board, and from allowing or permitting him to exercise any of the powers or functions as a member thereof." The district court found the issues in favor of the plaintiff and entered decree as prayed. The defendant Reigle has appealed.

The plaintiff contends in the brief that his official term began in 1915, and that the election of 1916 is invalid; that the term for which he was elected was by the force of the statute extended for four full years, so that he held by right until January, 1919. In *De Larm v. Van Camp,* 98 Neb. 857, it was said: "Mr. Berg was holding the office in 1906, and until January, 1907, must be regarded as filling the term that expired at that time. From January, 1907, he must be considered as holding over into that term." It was not said that his term was extended, as the relator now construes that language. This theory is derived from a construction of the former terms of the commissioners in

the three districts, respectively. The trial court, in a carefully prepared opinion, says: "The question then is, which two districts should have elected commissioners in 1914, and which district should have elected a commissioner in the year 1916? Very obviously this must be told by going back to the expiration of the respective terms of office subsequent to the legislation of 1905"—and concludes that in district No. 1 and in one of the other districts the term was from January, 1915, to January, 1919, and the election should have been held in 1914, and therefore no election could be held for those districts in 1916. And although for both districts No. 2 and No. 3 commissioners were elected in 1914, he concludes that they could not have been elected for the full term because of the former terms for which commissioners were elected in those districts. In *State v. McFarland,* 98 Neb. 854, the provision of the act of 1913 (Rev. St. 1913, sec. 1955), fixing the terms of commissioners at four years, is quoted, and it is said: "This change expressed the legislative construction of the former conflicting statutes, and two commissioners should have been elected in Madison county in 1914." And in *State v. Smith,* 102 Neb. —, the effect of this change in the law is further considered, and it was held: "To comply with the constitutional provision that elections shall be on the even-numbered years, the legislature has fixed the term of county commissioners at four years and named the specific years that shall constitute such terms hereafter." So that, whatever may have been the former practice, the terms of two commissioners began in 1915, and, if two were elected in 1914, the third should be elected in 1916. This plaintiff having been elected in 1912, he must be considered to have been elected for the remainder of the term which expired in January 1916, and from that time was holding for the term for which he was elected; so that his successor was properly elected in 1916 for the term commencing January, 1917. As the defendant Reigle was elected for that term commencing in 1917, he is entitled to the office, and the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JOSEPHINE N. TYNON, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 17, 1917. No. 19737.

Railroads: ACCIDENT AT CROSSING: INSUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and found insufficient to sustain the verdict.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

J. A. C. Kennedy, Kelligar & Ferneau and *Philip E. Horan,* for appellant.

Lambert & Armstrong and *R. F. Neal, contra.*

HAMER, J.

This action was brought by Josephine N. Tynon, plaintiff and appellee, to recover damages because of a personal injury claimed by her to have been sustained on account of the negligence of the defendant railway company. She had a verdict and judgment for $1,029.

She was in a buggy going from her home at Peru to Auburn, at which latter place she expected to take a train for Omaha where she was engaged as a teacher. The day was January 4, 1914. She was in an ordinary top buggy drawn by a team of horses which were driven by a Dr. Vance. The accident happened just east of Auburn at what is known as the "Good Road" or "Rock Road" crossing of the railroad track. It is claimed on behalf of the plaintiff that she looked and listened, but did not see or hear the approaching train, and was not aware of its approach until about the instant before the engine struck the buggy, and that the engineer in charge of the train saw the team and buggy approaching the track and knew that a collision was probable, and also that he was made aware of the danger when at a sufficient distance from the team and buggy to have prevented the collision by giving an alarm whistle, and

that if he had done so Dr. Vance, the man driving the team, could have stopped the same before the horses went upon the track. The plaintiff claims that the engineer failed to do anything to avoid the collision. This is the chief issue in the case. It should be stated that the defendant's train usually reached Auburn at 3 o'clock in the afternoon, but that the schedule had just been changed, and on that particular day the train was due to arrive at 2:30. The plaintiff appears to have known of the previous time fixed for the arrival of the train, but was not aware of the change in the schedule. She therefore did not know that the train was about due at the crossing. It is claimed by counsel for defendant that one of the horses in the team was very much afraid of trains and could not be driven anywhere near an engine, and that the witness Ivers had warned Dr. Vance of this fact and against hitching the team near the depot. It is claimed on behalf of the plaintiff that this fact becomes material on the disputed issue as to whether or not the bell was ringing, as is claimed by the defendant.

The day was cloudy and cold and with a wind from the north. The curtains of the top buggy prevented the occupants from seeing out except in front of them. The team traveled along at a rate estimated from four to six miles an hour. There is testimony that shortly before reaching the crossing the plaintiff pulled aside the top of the curtain and looked to the southeast along the track for the purpose of discovering whether there was a train coming, and she saw none. There is also testimony that Dr. Vance leaned forward and looked out of the buggy, but did not see the train. There appears to have been a down-hill grade on the railroad from a point something over a mile south of the "Good Road" crossing to a point beyond said crossing and clear to the depot at Auburn. On behalf of the plaintiff there is evidence that the train came around the curve at the brickyard something more than 40 miles an hour, but that the steam was then shut off and the train was left to drift. There is a conflict in the evidence as to whether the train was traveling 20 or 40 miles an hour. The engineer fixed the rate of speed at 20 to 25 miles an hour. It

appears to be conceded on both sides that at a short distance east of the track the team slowed down from a jog trot to a walk and continued this walk until just before the collision. The engineer of the train testified that he noticed the team at a distance of 70 or 80 feet from the railroad track and just after it had crossed the little bridge, which is just east of the crossing, and that he observed the slowing down of the team, and placed the distance of the team from the track at from 12 to 15 feet just before the accident. The engineer testifies he did not whistle or give the alarm as the train got close to the crossing, because he thought the team would stop before going on the track; that he had the team under observation from the time it slackened its speed until the collision occurred; that he could not see the occupants of the buggy, and only saw the slacking of the team, and that caused him to think that the team was about to stop. The slowing down of the team appears to have occurred from 50 to 75 feet from the track, and from this place the team continued to travel at a slow walk until just the instant before the collision occurred, when the horses made a jump. The horses were thrown high into the air and one was instantly killed. They were both thrown a considerable distance from the railroad track. The buggy lodged on the pilot, and the plaintiff and Dr. Vance remained in the buggy and were carried along on the pilot about 500 feet.

Counsel for the plaintiff in their brief seem to concede that she may have been negligent, but say that if she was negligent "her negligence consisted in not looking and listening sufficiently well;" that "she looked and listened, but did not see or hear the train," and "did not hear the whistle that was blown as the train was rounding the curve at the brickyard, nor the other whistles" which were blown, and did not hear the ringing of the bell, if any bell was rung. Plaintiff's counsel suggest in their brief that plaintiff failed to hear the whistles because the sound was probably drowned by the noise of the team and buggy traveling over the "Good Road," which was built out of ground rock, and may have failed to hear the roar of the train or the ringing of the

bell for the same reason. The argument is also made that if the bell had been ringing the horses would have heard it, and that it was a skittish team. Attention is called to the fact that the plaintiff had reason to believe that the train was not due for half an hour, and that this fact may have somewhat affected her diligence in looking for the train. The argument in the brief is very candid, because it concedes that, "if the plaintiff was guilty of any negligence, it consisted in the manner in which she looked and listened."

The railroad extended from the south toward the north. The train was running north. The road on which the team and the buggy were approaching extended from the east toward the west across the railroad track, and the buggy was going from the east toward the west. By looking out of the buggy in a southerly or southeasterly direction the train might have been seen approaching the point where the collision occurred. That the occupants of the buggy, including the plaintiff, did not carefully look and listen is apparent from the testimony of the witnesses. If they had done so, this accident would probably never have happened. This brings us up to the consideration of the doctrine of "the last clear chance." Of course, if the engineer of the train saw the team and buggy approaching the crossing and saw that there would probably be a collision if he did not stop, then it was his duty to warn the occupants of the buggy of the danger by blowing the whistle, or in any way possible, and to stop the train if he could.

In *Dailey v. Burlington & M. R. R. Co.*, 58 Neb. 396, this court held: "Notwithstanding a party has negligently placed himself in a position wherein he is exposed to injury, if another, after discovery of such condition, inflicts the injury by reason of failure to exercise ordinary care to avoid it, the former may have an action for damages against the latter." In the same case it is said in the body of the opinion: "It is a well-established doctrine that, notwithstanding a person may have so placed himself as to be liable to injury, yet if another, after knowledge of the fact, inflict injury because of the failure of the latter to exercise ordinary care to avoid it, the former may recover damages.

Union P. R. Co. v. Mertes, 35 Neb. 204; *Omaha Street R. Co. v. Martin*, 48 Neb. 65; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563." The foregoing authorities seem to sustain the position taken.

In *Zitnik v. Union P. R. Co.*, 91 Neb. 679, this court held: "The rule of 'the last clear chance' implies that the one charged with negligence knew the person injured was in a place of danger and negligently failed to avoid injuring him, but his testimony that he did not have such knowledge is not conclusive. Such knowledge may be shown by proof that the person injured was in a situation of imminent danger and so situated that the one injuring him, if he used his senses as human beings ordinarily do, must have known the danger."

This brings us to the consideration of conditions immediately preceding the collision.

Dr. V. V. Vance, a witness called for the plaintiff and who drove the team, testified that he thought he was back about 100 feet when he looked down the railroad track for the last time and could see down there for 200 yards, that after he had passed over the bridge at a slow trot he came onto the slight incline up to the railroad track, and that then the team slowed up. Clyde Harper, called as a witness for the plaintiff, testified that he thought the team slowed up as it reached the railroad track. C. B. Petticrew, called for the defendant, testified that it seemed to him that at a point about 50 feet from the track, where the incline began, the team checked up, and it looked to him from where he stood that they were urged across the track, and at the moment they got on the track the locomotive hit the buggy, throwing the team toward the depot.

There was evidence tending to show that the railroad track at the crossing was about five feet higher than the surrounding country; also, that the "Good Road" is elevated about 3½ feet above the surrounding land, and that this road approaches the track of the railroad on an upgrade about 70 feet long; also, that the surface of the ground is not uneven, and that the distance from the "Good Road" crossing south to the first whistling post is about a quarter

of a mile. Dan Pardue, George Stevens, and E. M. Bogart, witnesses called on behalf of the defendant, testified that the buggy curtains were closed, and that the team was trotting, and that the train was in sight, and that there was nothing to obstruct the view of the persons in the buggy. Roy Shanks, called on behalf of the plaintiff, testified that the train was in plain sight of the buggy; that he first saw the buggy about 200 or 250 yards from the crossing; that there was nothing to prevent the occupants of the buggy from seeing the train. Dr. Vance further testified that it was cloudy, but that the cloudiness did not interfere with the view of the occupants of the buggy, and that there was nothing between them and the train to obstruct their view. Art Bamber, called for the plaintiff, testified that he did not hear the train whistle until it reached the crossing; that when he first saw the train it was about 100 yards from the crossing; that when he heard the train whistle at the mile post it gave a long whistle.

The plaintiff testified that Dr. Vance was driving the team; that when they tried to ascertain whether there was a train on the track she pulled down the curtains and looked down the track, but that she never saw or heard anything; that when she looked she reported to Dr. Vance that the track was clear. She also testified that she did not know whether she could have seen the train if she had looked, but that there was nothing to obstruct the view. Dr. Vance further testified that he asked Miss Tynon to look, and that she lifted the side curtain, and then told him that the track was clear. He testified also that a little further on, four or five buggy lengths, he reached forward and looked again; that the team slowed down as they reached the incline leading to the railroad track; that he thought that the incline commenced about 70 or 80 feet from the track.

As the railroad track was elevated, and the "Good Road" was elevated, and there was also an incline still further elevated as the road approached the crossing, it would seem, according to the testimony, that there was nothing to obstruct the view of the railroad track from the buggy, and that the plaintiff and Dr. Vance should have seen the ap-

proaching train. As the train was not considered to be due until 3 o'clock, that may have affected their alertness and vigilance.

The team appears to have been about 12 to 15 feet distant from the railroad track after it checked up and just immediately before the collision. There is testimony that it nearly stopped. Then it jumped forward. The engineer saw the team slow up. He testified that he "thought they were stopping. * * * I thought they were almost stopped. They were almost stopped. * * * I got it in my head they were stopping." Counsel for the plaintiff interrogated the witness: "Q. You thought they were going to stop? A. Yes, sir. Q. And that is why you didn't whistle? A. Yes, sir. Well, the whistling wouldn't do any good anyhow. * * * I supposed they were going to stop * * * I thought they were almost stopped. They come to a check-up; and, if they were going on the track, I thought it was no use to whistle. I went for the air." Farther along in the evidence it is shown that after the team had checked up it suddenly started forward. When asked what he then did, the engineer testified: "I throwed the air into the emergency and tried to stop." When asked why he gave the attention to the air and the emergency, he answered: "Because it was the only thing that would do any good at that time; the whistle would do no good." While we may not accurately know the distance between the engine and the buggy at that time, only a second or two could intervene between throwing on "the air and the emergency" and the collision. He testified: "I had to turn the sand on to stop it quick." Perhaps what the engineer did lessened the speed of the train sufficiently to save the lives of both occupants of the buggy. With the horses jumping for the track, it cannot be said that the engineer acted unwisely.

Shortly before the collision the engineer seems to have blown the whistle on four separate occasions. The evidence shows that the engineer blew the whistle for the crossing south of the brickyard, for the crossing north of the brickyard, and that at about half way between there and the "Good Road" crossing he whistled for Auburn, and at the

whistling post at the "Good Road" crossing he again whistled. As the road crossing whistles are each two long and two short blasts, and the station whistle is one long blast, he must have whistled much of the time. There would be four blasts for each road crossing, making twelve for road crossings, and one long blast for the station would make thirteen in all; and these blasts were all given within a mile of Auburn. The last road crossing whistle was given within a quarter of a mile of the station at Auburn. It would seem that so much whistling ought to have been heard. Then the "automatic bell" had been set to ringing. "It was working all the time since we left Atchison."

It would seem that, if the plaintiff has been negligent and her negligence places her in a place of danger, this will not warrant the defendant who finds her in such place of danger in perpetrating an unnecessary injury upon her; but if the physical facts show that she should have seen the train, and she testified that she looked out and did not see it, it must be presumed that the train was there, and that the fault of failing to see it was her fault and due to her negligence. *Erie R. Co. v. Hurlburt,* 221 Fed. 907; *Pittsburgh, C., C. & St. L. R. Co. v. Fraze,* 150 Ind. 576, 65 Am. St. Rep. 377; *Union P. R. Co. v. McDonald,* 152 U. S. 262; *Lynch v. Pennsylvania R. Co.,* 88 N. J. Law, 408; *Pennsylvania R. Co. v. Righter,* 42 N. J. Law, 180.

In *Erie R. Co. v. Hurlburt, supra,* Judge McCall, delivering the opinion of the court, said: "It challenges human credulity to be asked to believe that Mrs. Hurlburt looked and listened, as she says that she did, and neither saw nor heard the train that smashed into her buggy and wrought such havoc. There is no evidence that tends to explain why she did not see the oncoming train. Her testimony explodes every theory upon which to predicate an explanation that would tend to excuse her. Indeed, it is so improbable that it does not afford a scintilla of evidence upon which to go to the jury. We are of opinion that it was error to refuse the company's motion for a directed verdict at the close of all the evidence."

In *Lynch v. Pennsylvania R. Co., supra,* the court said: "As has already been stated, from the point where the plaintiff says he stood when he made his observation, the view along the track in the direction from which the engine was approaching was practically unobstructed for a distance of approximately 250 feet. That the engine was still within this distance when the plaintiff made his observation is demonstrated by the fact that at once after doing so he stepped upon the track and was immediately struck. It follows, therefore, either that he was mistaken in his statement that he looked, or else that he looked in such a perfunctory manner that he was not conscious of what was immediately before his eyes. In either event he failed to use that reasonable care for his own safety which the law requires of all persons when approaching these places of known danger."

In *Hooker v. Wabash R. Co.,* 99 Neb. 13, a deaf man named Davis was walking on the track ahead of a freight train. He could talk and was able to understand what was said to him by watching the lips of the speaker. Two of his friends had warned him against the danger of walking on the railroad track, and to one of them he had replied that he "would have to keep his eyes open for that train, because he had to depend on his eyes for his ears." He was struck by the locomotive and killed. A judgment for $15,000 was awarded the administrator of his estate. On appeal this court held that the facts shown by the evidence were "not sufficient to warrant the application of the rule of 'the last clear chance.'" It also held: "Where the undisputed evidence shows that none of the train crew had any knowledge that an adult person walking upon the track was deaf, or was afflicted with any other infirmity, that the engineer used all proper signals to warn him of the approach of the train up to the instant when it appeared that he was not going to step off the track, and at that instant did everything possible to stop the train and avoid a collision, it cannot be said that the engineer carelessly ran the pedestrian down." In the body of the opinion it was said: "There was no time after Davis was discovered upon the track, up to the very

minute when he was struck by defendant's engine, that he could not have avoided the injury to himself by merely stepping off the railroad track, and we think it cannot be said that he was discovered to be in a state of peril at any point of time before the engineer used his utmost endeavor to stop the train." Many authorities were cited in support of the view that the facts were not sufficient to invoke the doctrine of "the last clear chance." Among these we refer to *Drown v. Northern O. T. Co.*, 76 Ohio St. 234; *Dyerson v. Union P. R. Co.*, 74 Kan. 528; *Green v. Los Angeles T. R. Co.*, 143 Cal. 31; *Holwerson v. St. Louis & S. R. Co.*, 157 Mo. 216; *Merritt v. Foote*, 128 Mich. 367.

The case at bar does not belong to that class of cases to which the doctrine of "the last clear chance" is properly applicable. The engine was too close to the buggy and too near to the unexpected and apparently inevitable collision to enable the engineer to long reflect. He was compelled to act at once, and his impulses were in the direction of saving life by stopping the train or reducing its speed. He was successful in his efforts, for the occupants of the buggy were saved from the instant death which threatened them, although one of them was injured as the train could not be stopped at once. No one may say with certainty that the engineer, who was confronted by probable death to the persons just ahead of him, and who had a duty to perform concerning the safety of the passengers behind him, did not exercise a wise discretion. Because of the unsatisfactory character of the plaintiff's testimony, and because of the known physical facts shown to be apparent in the case, as well as because of the evidence in favor of the defendant, it would seem that there is nothing to support the doctrine of "the last clear chance."

The defendant railroad company is not liable, because there was no negligence upon the part of its engineer in charge of the train which in any way tended to bring about the plaintiff's injury. He had the whistle give thirteen blasts in the distance of a mile, which was probably traveled in a little more than two minutes immediately preceding the accident. He had the whistle give four blasts for the

"Good Road" crossing, and when the last blast was given the engine could not have been far from the crossing itself where the accident happened, as the whistling posts were placed only a quarter of a mile from each crossing, and, while the four blasts were being given, the train, as shown by the evidence, would run its length toward the crossing. He had a right to believe that the two persons in the buggy had seen and heard the train, and knew that it was approaching and that it was close to the buggy, and he also had a right to believe that the buggy was about to stop. This belief was justified, because the buggy nearly stopped within a few feet of the track, and up to the time that the horses suddenly sprang forward, as if to cross the track, he had no reason to suppose that the buggy was going upon the track. It cannot, therefore, be said that plaintiff "was discovered to be in a state of peril at any point of time before the engineer used his utmost endeavors to stop the train."

The plaintiff has failed to establish her case, because her conduct could not reasonably be anticipated by the engineer of the train, and her injury appears to be due to her own negligent action, and not to any act of the defendant or its railway engineer.

REVERSED AND REMANDED.

ROSE and SEDGWICK, JJ., not sitting.

MCCAGUE INVESTMENT COMPANY, APPELLANT, V. METROPOLITAN WATER DISTRICT, APPELLEE.

FILED NOVEMBER 17, 1917. No. 19665.

1. **Municipal Corporations: WATER DISTRICT: SPECIAL ASSESSMENTS: APPEAL.** The statutes of this state make no provision for appeal from the equalization and assessment of special taxes by a metropolitan water district, and an attempt to prosecute such an appeal confers no jurisdiction on the district court to review the order made.

2. ———: ———: PROCEEDINGS IN ERROR. District courts have jurisdiction to review by proceedings in error an order by the board of equalization of a metropolitan water district.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Affirmed.*

Charles Battelle, for appellant.

John L. Webster and *William R. King, contra.*

CORNISH, J.

The first question presented is whether appeal lies from the equalization and assessment of special taxes by a metropolitan water district, on lots abutting on its water mains. The trial court found that it did not.

Such districts are a separate body corporate, created by law, and may include (in this case did include) more than one municipality. They come under the provisions of the general law relating to water main extension or enlargement by districts. Rev. St. 1913, secs. 5263-5269. Section 5267, besides providing for assessment against abutting property and the manner of payment of the special taxes, concludes as follows: "Prior to the levy of such special taxes herein provided, the same shall be equalized in the same manner as is provided by law for the equalization of special assessments levied in such cities and villages."

The tax in controversy was on lots in the city of Omaha. Section 4343, Rev. St. 1913 (section 241, Omaha charter), provides in detail the manner of the city council sitting as a board of equalization, and provides that, after corrections have been made, the council at a regular meeting thereafter may, by ordinance, levy special assessments, which ordinance is made subject to appeal. It is to be remembered that the lots under consideration might have been situate in some other territory within the district, outside of the city of Omaha—might have been in South Omaha, whose charter had no such provision for appeal.

It is contended by plaintiff that, the lots being in the city of Omaha territory, and section 241 of the Omaha charter, providing for equalization of taxes, permitting ap-

peal from the final order of the city council, plaintiff is entitled to appeal. We think this is a *non sequitur*. The directors of the water district, or board, were the authority having power to make the equalization. A direction as to the "manner" in which equalization shall be made refers to "manner" alone. The right of appeal given in section 241 of the charter being an appeal from an ordinance by the city council, based upon the work done by the city's board of equalization, is a thing distinct from the "manner" of arriving at the benefits or equalization. The metropolitan water district of Omaha is a separate body corporate, and, if the legislature had intended to give the right of appeal from the findings of the board of directors, sitting as a board of equalization, it would have said so. Boards of this character have certain discretionary powers. A right of appeal substitutes the discretion of the appellate tribunal for that of the board to whom it has been specifically committed. This court has denied the right of appeal in such cases unless it is clearly shown to exist by statute.

In *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30, it was held that no appeal lay from the county commissioners, sitting as a board of equalization, although appeal did lie from the action of the county board on matters properly cognizable before them. The two boards, it was said, are separate tribunals.

In *Whedon v. Lancaster County*, 76 Neb. 761, an appeal from the action of the county board making a tax levy was denied, although appeal was allowed from the action of the county board of equalization, the court saying: "The right of appeal in this state is purely statutory, and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist."

In the instant case, the granting of the right of appeal from the ordinance of the city council of Omaha, a separate and distinct body from the water district, can have no reasonable reference to the powers which are or should be given to the water board. For other cases, bearing upon the question of the right of appeal from boards of this character, see *Webster v. City of Lincoln*, 50 Neb. 1; *Dodge Coun-*

ty v. Acom, 72 Neb. 71; *Wead v. City of Omaha*, 73 Neb. 321; *Keokuk & Hamilton Bridge Co. v. People*, 185 Ill. 276.

No doubt, the action of such a board may be reviewed by proceedings in error. *Munk v. Frink*, 75 Neb. 172; Rev. St. 1913, secs. 7880, 8175. It is not necessary to consider the other points raised in the case.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

GLADYS BAILEY, APPELLEE, v. SCOTT HURTT, APPELLANT.

FILED NOVEMBER 17, 1917. No. 19708.

1. **Appeal:** CONFLICTING EVIDENCE. Where there is competent evidence to sustain the verdict, the judgment of the trial court will not be disturbed, even though the testimony conflicts on a material point.
2. ———: INSTRUCTIONS. Where the trial court in its instructions has stated the law that is applicable to the issues raised by the pleadings and the testimony, a party to the action cannot predicate error upon the failure of the court to instruct the jury upon a particular point in the absence of a request therefor.
3. **Bastardy:** EVIDENCE. "Evidence of the unchastity of a complainant in a bastardy proceeding, outside the period of gestation, is irrelevant to the issues presented for trial." *State v. O'Rourke*, 85 Neb. 639.

APPEAL from the district court for Furnas county: ERNEST B. PERRY, JUDGE. *Affirmed.*

John Stevens and *O. E. Shelburn*, for appellant.

Lambe & Butler, contra.

DEAN, J.

Gladys Bailey is an unmarried woman who resides in Furnas county. She filed a complaint charging Scott Hurtt with the paternity of a bastard child born to her July 12, 1915. She recovered a judgment for $1,200, from which he has appealed.

Plaintiff testified that she met defendant on the evening of October 2, 1914, at a dance at Wilsonville, and that after the dance was over she accepted his offer to escort her in his buggy to her father's home, distant about 5 miles, and that on their way home the offense was committed. Defendant introduced testimony tending to prove that on the night in question he was at a party given by some friends in Beaver City, and he denied that he was in the company of Miss Bailey at any time during that night, or that he ever committed the offense charged. He admitted that he once escorted her from a dance at Wilsonville to her home, but he says it was about two weeks before the time named by her at the trial. The testimony with respect to these discrepancies was all fairly submitted to the jury, and any doubt that may theretofore have existed on this point was dispelled by the verdict.

It is argued by defendant that the jury could not properly find from the testimony that the bastard child was born alive. This contention cannot prevail, for the obvious reason that the babe was at the county seat at the time of the trial, but was not in the courtroom. It would serve no good purpose to analyze the testimony at greater length. We find that it supports the verdict, and with that we are content.

Defendant contends that the court erred in instructing the jury that the plaintiff's reputation for chastity was not a proper subject for their inquiry, and insists that "this should have been considered by the jury in judging her credibility as a witness." On this point the jury were correctly informed that the chastity of the complaining witness was not one of the issues in the case. *Clow v. Smith,* 85 Neb. 668; *State v. O'Rourke,* 85 Neb. 639. He also argues that the instructions state the law incorrectly with respect to the credibility of the respective witnesses where the testimony conflicts on points that are material. This contention is obviously without merit in view of the explicit instruction No. 3, given evidently in pursuance of the provisions of section 361, Rev. St. 1913, and also in view of instruction No. 5 wherein the jury are correctly informed on the points to

which defendant calls our attention. *Nelson v. Spratt,* 100 Neb. 690.

The court instructed the jury fully on all of the issues properly triable by it. Defendant requested no instructions, and, in view of those given, he cannot now be heard to urge that additional instructions should have been given.

Finding no reversible error, the judgment of the trial court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

T. J. BRUNER COMPANY, APPELLEE, V. FIDELITY & CASUALTY COMPANY OF NEW YORK, APPELLANT.

FILED DECEMBER 1, 1917. No. 19715.

1. **Insurance:** INSURANCE AGAINST BURGLARY: USE OF EXPLOSIVES. A burglar insurance policy indemnified the assured from loss by the stealing of property from a fire proof safe "by any person or persons who shall have made entry into the safe or safes by the use of tools or explosives thereupon." The outer doors had been locked by a combination lock, but there was no evidence of the use of tools or explosives thereupon. The steel inner doors which were locked by a key lock had been opened by the use of explosives. *Held,* that "entry into the safe" was made by the use of explosives, and that it was not material that the outer doors had not been so opened.

2. ———: ———: EVIDENCE. Evidence examined, and *held* to sustain a finding that no employee or servant of the plaintiff was criminally implicated in the burglary.

3. ———: ———: ———: BOOKS OF ACCOUNT. Certain minor errors and discrepancies were shown to exist in some of the books of the assured. These were called to the attention of plaintiff's manager at the trial and were corrected. *Held,* that they were not of such importance as to justify the forfeiture of the insurance on account of a provision of the policy that there should be no liability "unless books and accounts are regularly kept by the assured and the loss can be accurately determined therefrom by the company."

4. **New Trial:** REVIEW. The granting of a new trial is largely committed to the discretion of the trial court, and unless a clear abuse

has been shown this court will not interfere. *Grand Lodge, A. O. U. W. v. Bartes*, 69 Neb. 636.

5. **Attorney and Client: FEES: REVIEW.** A motion in the lower court to retax costs is unnecessary to review a judgment awarding an attorney fee in an action on an insurance policy. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Morsman, Maxwell & Crossman, for appellant.

J. C. Kinsler, contra.

LETTON, J.

Plaintiff, a wholesale jeweler, procured from the defendant insurance corporation a burglary insurance policy. The material parts of this policy which apply to fire-proof safes are that the defendant agrees to indemnify the assured "for all loss—

"(A) In consequence of the felonious abstraction during the day or night from within the safe or safes described in the schedule and located in the premises as hereinafter defined, by any person or persons who shall have made entry into the safe or safes by the use of tools or explosives thereupon," of money, securities and merchandise.

"(B) By damage to the said safe or safes, and to the said property contained therein, and to the premises, and to the office furniture and fixtures therein, caused by any person or persons while making or attempting to make entry into the safe or safes, or into any vault containing such safe or safes, by the use of tools or explosives thereupon."

It further provided that the company shall not be liable for any loss—

"(g) If any servant or employee of the assured, or any person lawfully upon the premises, is criminally implicated as principal or accessory in effecting or attempting to effect loss covered under this policy;

"(h) Unless books and accounts are regularly kept by the assured and the loss can be accurately determined therefrom by the company. * * *

"(1) From within any safe unless at the time of the occurrence of the loss the safe was properly locked by all combination locks on same."

The proof on the part of the plaintiff tended to show that on the evening of Sunday, May 23, 1915, the office rooms of the insured, which are located in an office building in the city of Omaha, were opened by the use of a chisel or jimmy near the latch, and the outer door of safe No. 4, which was locked with a combination lock, opened without the use of tools or explosives, and the double inner doors, which were locked with a key lock, blown open by an explosion, and diamonds and other property to the value of $3,357.91 feloniously abstracted; that this was discovered by the night watchman on beginning his rounds about 7:30 p. m., who immediately notified the plaintiff's manager, T. J. Bruner, and the police. Plaintiff at once gave notice of the loss to defendant, which denied liability and refused to pay for the loss. In its answer defendant denied that any person unknown to plaintiff made entry into the safe by the use of tools or explosives thereupon, and feloniously abstracted any property covered by the policy and damaged the safe. It pleads the conditions of the policy above set forth, and alleges that, if the plaintiff suffered any loss from said safe No. 4, access was not had by the use of tools or explosives upon the outside of the safe; that all the combination locks were not then locked; that the plaintiff has failed to keep proper books of account; and that the loss, if any, was occasioned and caused by some person or persons connected with plaintiff and being lawfully upon the premises, whose names are unknown to defendant. The reply is a general denial. The plaintiff recovered a judgment in the sum of $3,391.88. The court allowed the sum of $800 as attorney's fees and taxed the same as part of the costs. Defendant appeals.

A number of assignments of error are made. Defendant insists that the provision that the policy only insures against loss caused by "any person or persons who shall have made entry into the safe or safes by the use of tools or explosives thereupon" means the use of such instrumen-

talities upon the outside doors of the safe, and that the court erred in holding that it was only necessary to prove that the safe or some part of the safe was entered by the use of tools or explosives. This safe had double doors. Until the inner doors were opened no access could be had to its contents, and no entry made into the safe proper. Explosives were used upon the inner door. We think the district court was right in its construction of the language of the contract. *Fidelity & Casualty Co. v. Sanders,* 32 Ind. App. 448; *Mt. Eden Bank v. Ocean Accident & Guarantee Co.,* 96 S. W. (Ky.) 450.

It is next said that the court should have directed the jury to return a verdict for the defendant because Bruner, the manager of the plaintiff corporation, was the only man who knew the combination, and since the outer doors were opened in the ordinary way, and the chance of working the combination in an hour's time is one in several millions, the conclusion is inevitable that the safe was not locked, or else it was opened by Bruner. We think this conclusion is a *non sequitur.* There is evidence that such safes may be opened by experts by manipulation of the knob of the combination lock, and other evidence which is sufficient to support a finding by the jury that no employee was a participant in the burglary. The evidence on behalf of plaintiff is that Bruner left the office about 12:45 on Sunday afternoon and did not return until about 7 o'clock that evening when called by the night watchman. This man came on duty at 6 o'clock, and in making his rounds noticed some marks upon the office door and jamb indicating that the lock had been forced. On making an investigation he found that the outer doors of one of the safes were open, and that the inner doors had been blown open by an explosion. There were remains of a soap dam around the keyhole of the inner doors, and soap apparently had been used upon the flanges of the outer doors to confine the air and gases of the explosion and to silence the noise. The lock to the inner doors was broken, scattered and destroyed. A witness for defendant testified that he heard a sound like an explosion in the building between 1 and 2 o'clock in

the afternoon. Defendant argues that in all probability Bruner did not leave the building at 12 o'clock and go home to lunch, as he testified, but that he remained until after the explosion occurred, and virtually charges him with robbing the safe. The testimony of Bruner as to his movements is quite strongly corroborated by apparently disinterested witnesses. It was for the jury to determine what the actual facts were from all the evidence, and we are not able to say that they arrived at an erroneous conclusion.

Another assignment is that the plaintiff had not kept books from which the loss could be accurately determined. It is claimed that a memorandum book which listed the diamonds purchased, with their weight and cost, had a number of erasures and alterations in it. The testimony shows that when a diamond left the place of business, either when sold or upon approval, an entry was made in the margin of this book showing the disposition of the gem. Many of these entries were customarily made in pencil. Sometimes stones would be returned. Instead of making a new entry, the pencil memorandum would be erased, and when the diamond went out again a new pencil entry would be made. It developed upon the witness-stand that some mistakes had been made with reference to the description and disposition of some of the stones listed as having been stolen. The jury were instructed by the district court that such items should not be charged against the defendant insurance company, and that certain discounts which it was shown by cross-examination of Bruner had been received on certain articles should also be allowed defendant. These mistakes were in small proportion to the amount of the loss. It is shown that full sets of double-entry books of account had been kept since the business was begun, and these, with cash book, sales books, invoices and inventory taken January 1, 1915, were produced to the defendant long before the trial. We are of opinion that the provision of the policy mentioned should not be construed so strictly as to forfeit the insurance on

account of the minor mistakes or discrepancies in the diamond record.

The district court instructed the jury that plaintiff admitted there were errors in the account amounting to $39.39, and that discounts had been taken amounting to $106.83, for which plaintiff could in no event recover: The court further instructed the jury in substance that, before the plaintiff could recover the burden of proof was on it to prove by a preponderance of the evidence: (1) That the safe was feloniously entered by the use of tools or explosives; (2) that the property described in the petition was in the safe and was stolen therefrom; (3) the value of the property stolen; (4) that the safe was properly locked; "(5) that plaintiff kept books of account from which the loss could be accurately ascertained; (6) that no employee or servant of the assured, and no person or persons lawfully on the premises, was implicated as principal or accessory in the burglary: If plaintiff has so proved all the above facts, then your verdict should be for the plaintiff. If plaintiff has failed to so prove all the above facts, then your verdict should be for the defendant."

The defendant argues that in its opening statement to the jury it asserted its reliance upon the violation of the conditions that there should be no recovery if the combination lock was not locked at the time of the entry; and that no recovery could be allowed unless the assured kept books of account from which the loss could be accurately ascertained, and complains that these two defenses were "improperly and indiscriminately included and commingled in a general instruction;" that the refusal to give specific instructions upon these points deprived it of its right to submit to the jury its theory of the case. The district court had correctly instructed the jury upon each of these points and it was unnecessary to restate the law. The instructions, taken as a whole, are pertinent, clear and concise, without unnecessary repetitions or involved language, plain to the understanding of the average man.

The next assignment of error, and that which is perhaps most earnestly argued, is that a new trial should have been

granted on account of newly discovered evidence. The motion for a new trial filed in the district court alleges that one of the attorneys for the defendant had many conversations before the trial with Ada James, bookkeeper for the plaintiff, concerning the alleged burglary, but was unable to obtain the facts set forth in her affidavit from her; that after the trial an affidavit was made by Mrs. James in substance as follows: That she became connected with the Bruner company in 1914 when the company opened for business in its present location; that she had charge of the books; that at several times during her employment she made entries in the books at Mr. Bruner's directions with reference to the sales and credits which were incorrect, more especially with reference to the sale of certain jewelry for which a victrola was taken in part payment, and of an automobile for which a diamond was taken out of the stock and given as part of the purchase price, as well as a number of smaller items for which no proper charge was made; that she first mentioned these items for which no proper charge was made in September, 1915, after the burglary, when she spoke to Riggs, Jr., one of the stockholders; that after the trial, at the annual meeting of the company, at which she was not present, she understood that these items were called to Bruner's attention, and that she personally knows that since the meeting an arrangement has been made whereby Bruner is to pay into the treasury of the company $50 a month to cover things which he has taken and which have never been charged; that after the meeting Bruner made it unpleasant for her, and for that reason she left the employment of the company; that on the morning after the buglary Bruner suggested they had better make a list of the losses, and that this was made, a copy of which is the original claim list given to the insurance company. Before the list was made, at Bruner's instructions, she made entries in the stock books of the salesmen showing the return of certain goods which were not in the safe at the time of the burglary, but were in the traveling men's trunks; that though they inquired as to the books she did not tell plaintiff's attorneys about the en-

tries. Counter affidavits were filed to the effect that Mrs. James had stated to plaintiff's attorneys that she kept the books herself, knew they were absolutely correct, and that the records would show that all the diamonds claimed to have been stolen were stolen. There are also affidavits by each of the three salesmen denying specifically and in detail the statements that part of the property claimed to have been stolen was at the time of the burglary in their trunks or traveling cases. Riggs, Jr., to whom Mrs. James made certain charges of irregularity against Bruner, deposes that he and the other stockholders made a careful investigation of the books, and of the charges made by Mrs. James, and that they found all of the charges of irregularity to be wholly unfounded; that Bruner's conduct was approved, and at the annual meeting it was voted to increase his salary, to give him a vacation, and to allow him $200 additional pay; that he and the other stockholders were fully cognizant of the purchase of the automobile and the manner of payment, and of the procurement of the accident insurance and the payment for the gasoline used in the machine, and that all these matters were fully sanctioned and authorized. He further states that an examination of the books has been made since the filing of Mrs. James' affidavit and the charges of irregularities in the entries are wholly unfounded and untrue. The affidavit of the senior Riggs, who it was stated is the principal stockholder in the company, is to the same effect. Mr. Bruner also files an affidavit, stating that the charges made by Mrs. James were false, and denying specifically and in detail a number of statements made in her affidavit. Attached to Mr. Bruner's affidavit are photographic copies of certain books mentioned in the affidavit of Mrs. James. These exhibits seem to bear out the denials made by Mr. Bruner.

Where charges of such serious moment and grave import are made against parties interested in an action, the district court should scrutinize the evidence in support of the charges or in denial thereof with great care, and should

take particular pains to see that no fraud or deceit has been practiced upon the court or jury. Most of the persons making the affidavits were present in court during the trial. Several of them were witnesses, and the district judge had an opportunity to see and observe their conduct and listen to their statements. It would be impossible for him in considering the affidavits to disassociate his mind from the impressions he received at the trial. Indeed, it would be undesirable that he should do so. Among the strongest aids to the ascertainment of truth are the inflections in the language, the demeanor, appearance, and expression of the countenance of witnesses. There are other indicia of veracity which cannot easily be explained, but of which every judge of experience is aware. The affidavit of Mrs. James, when met by the counter affidavits of the other affiants, failed to convince the district judge that a fraud had been perpetrated as alleged by her. The granting of a new trial is largely committed to the discretion of the trial court, and unless a clear abuse has been shown this court will not interfere. *Grand Lodge, A. O. U. W. v. Bartes,* 69 Neb. 636.

The trial court allowed a fee of $800 to plaintiff's attorney, which is assessed as costs, and which is complained of as excessive and unauthorized. The plaintiff argues that a motion to retax costs was necessary, and that although one was filed it has never been acted upon by the district court, and hence cannot be reviewed. In *Hartford Fire Ins. Co. v. Corey,* 53 Neb. 209, and *American Fire Ins. Co. v. Landfare,* 56 Neb. 482, it was held that a motion in the lower court to retax costs is unnecessary to review a judgment awarding an attorney fee in an action on an insurance policy. The fee allowed is nearly 25 per cent. of the recovery and seems excessive. It seems to us that a fee equal to 10 per cent. of the judgment is as much as should be taxed as costs, and the allowance is reduced to that amount.

In conclusion, while there is a possibility that the safe might have been opened in the manner charged by the

defendant, and while there are some matters in the evidence which are not entirely satisfactory, the preponderance of the testimony supports the verdict of the jury, and the action of the trial court in overruling the motions for a new trial. The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

ARTHUR HAUSER V. STATE OF NEBRASKA.

FILED DECEMBER 1, 1917. NO. 19862.

1. **Venue**: APPLICATION FOR CHANGE: REVIEW. A motion for a change of venue is directed to the discretion of the trial judge, and unless an abuse thereof is disclosed by the record his ruling will not be reversed in the supreme court.
2. **Identification of defendant** as the person who committed the felony charged, *held* sufficient.
3. **New Trial**: RULING. Where the presiding judge is unavoidably prevented from ruling on the motion for a new trial, another judge may perform that duty.

ERROR to the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Affirmed.*

R. S. Horton and *J. E. Bednar*, for plaintiff in error.

Willis E. Reed, Attorney General, contra.

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Arthur Hauser, defendant, was convicted of murder in the first degree and was sentenced to the penitentiary for life. As plaintiff in error, he presents for review the record of his trial.

One of the assignments of error challenges the overruling of a motion for a change of venue. It is contended that the public mind was inflamed against defendant by reports that he was guilty and that he had committed other

cruel and revolting crimes. In this connection it is argued that the prejudice shown was sufficient to prevent accused from having a fair trial in the city of Omaha, where the homicide occurred. To establish these propositions defendant relies on testimony of newspaper reporters and on articles in the daily press. The inquiries which prompted individual expressions of prejudice to which the reporters testified were directed to a small number of persons, when compared with the public generally. The expressed prejudice against accused resulted principally from newspaper reports. It does not necessarily follow that, in a great center of population like Douglas county, there was thus established public prejudice or ill feeling sufficient to prevent a fair and impartial trial before an unbiased jury, limited in their deliberations to proper proofs of the felony charged. Threats of violence were not shown. There was no attempt to interfere with an orderly trial. On review there is no suggestion that any juror impaneled had been influenced or prejudiced against defendant, or that any juror, during the trial, was guilty of misconduct. The motion was directed to the discretion of the trial court, and the conclusion is, upon a consideration of the entire record, that an abuse of discretion in denying a change of venue is not shown. The assignment of error is therefore overruled.

The insufficiency of the evidence to sustain the verdict is also urged as a reason for reversing the judgment. The failure of proof, according to the defense, is the lack of identification of accused as the person guilty of the felony charged. The point does not seem to be well taken. Near the intersection of Thirty-first and Dodge streets in Omaha, William H. Smith was feloniously shot and killed about 10 o'clock at night October 16, 1915. It had been raining and the night was dark. When shot Smith was walking with Grace Slater, who was on her way to her home. The victim was left where he fell. Following the homicide, for an hour perhaps, Grace Slater was involuntarily in the company of the person who did the shooting. During most of that time she was compelled to walk ahead of the felon

at arm's length. They walked in vacant lots where there were weeds and bushes. Sometimes they were in the streets. At other times they were in the shadows of buildings. He talked almost constantly. Finally he took what money she had, gave her five cents, and permitted her to depart on a street car. This is a portion of her story as told on the witness-stand, and it is not questioned. At one time she expressed a doubt about being able to identify the felon without hearing his voice. Later, however, she did thus identify defendant in a prison in Wichita, Kansas. From there he was taken to Omaha, tried and convicted. Defendant challenges the identification on the following grounds: The night was dark. The man who shot Smith was behind Grace Slater during all of the time they were together. At first he wore a mask. Without it she did not see his face. Before seeing defendant at Wichita she admitted she could not by sight identify the person who shot Smith. The record answers the argument on this point by evidence tending to prove the following facts: It was not raining all of the time Grace Slater was in the custody of the felon, and he was then without a mask. She saw the side of his face a number of times. She saw him in the light of the street lamp. She observed his stature and clothing. She recognized his voice and identified him positively. He was in Omaha when Smith was killed. Defendant was observed not far from the scene of the felony both before and after it was committed. Under the circumstances the jury were justified in finding that a front view of his face was not necessary to identification. Recognition of a profile is not uncommon and is not necessarily unreliable. In photography the profile is common as a likeness. The mental faculties of Grace Slater, while observing the felon on the night of the homicide, would naturally be aroused by the tragedy, by the distressing experiences which followed, and by her own peril. Her account of the ordeal indicates that she did not lose her self-possession. Frequent observations at arm's length, even at night, when the mind is alert, may make deep and accurate impressions. The conclusion is

that the identification and the other evidences of guilt are sufficient to sustain the verdict.

The final assignment of error argued is the overruling of the motion for a new trial. The chief proposition under this head is that a judge who does not preside at the trial is without authority to pass on the motion for a new trial. The judge before whom the present case was tried died before passing on the motion for a new trial and it was overruled by another judge. It is argued that the trial judge is a part of the tribunal to try the issues of fact, and that he hears the testimony, observes the witnesses and takes note of all that affects the rights of accused while in court. Defendant insists that he lost the advantages which personal observation gave to the presiding judge. There is force in this argument, and the advantages which the presiding judge obtains by his presence in court should be seriously considered in the deliberations on each case where necessity requires another judge to act on a motion for a new trial. While the courts are not in harmony in their answers to the question here presented, this court has taken a view at variance with the contention of defendant herein. *State* v. *Gaslin*, 32 Neb. 291; *Lauder* v. *State*, 50 Neb. 140; *Goos* v. *Krug Brewing Co.*, 60 Neb. 783. Adherence to the rule announced in these cases results in the overruling of this assignment of error, an abuse of discretion in denying a new trial not having been shown.

AFFIRMED.

SEDGWICK, J., not sitting.

LILLIAN UNZICKER, APPELLANT V. FRANK UNZICKER, APPELLEE.

FILED DECEMBER 1, 1917. No. 19599.

1. **Divorce:** PERSONAL VIOLENCE. Although unpleasant relations between husband and wife have been caused by the intermeddling of third parties, and not wholly by the husband himself, such cir-

cumstances will not justify him in using personal violence against his wife.

2. ———: ———. The law does not allow a husband to use personal violence against his wife even for her own good. He cannot justify striking or slapping his wife by showing that it was necessary to to do so in order to compel her to go out for a ride for the benefit of her health.

APPEAL from the district court for Deuel county: HANSON M. GRIMES, JUDGE. *Reversed, with directions.*

Hoagland & Hoagland, for appellant.

L. O. Pfeiffer, contra.

SEDGWICK, J.

The plaintiff, in her petition in the district court for Deuel county, asked for a divorce from the defendant upon the ground of cruelty, and asked for the custody and care of her infant daughter. The trial court, after hearing the evidence, dismissed her petition, and left the infant daughter in the custody of the defendant. The plaintiff has appealed.

From the pleadings and evidence it appears that these parties were married in June, 1912. They went to live at a hotel that was being managed by the defendant's mother, who was separated from her husband. There was an understanding between the parties at the time of their marriage that they would live a short time at this hotel and would then live in a home by themselves. There was more or less trouble between these parties from the time of their marriage and during all the time that they stayed at the hotel. They were young, and the plaintiff's father and mother and the mother of the defendant appear to have disagreed, and perhaps to have quarrelled and to have interfered too much with these young people. This may have been largely the cause of their trouble, and it is difficult to tell from the evidence who of these older people was more at fault and was most responsible for the trouble between this husband and wife. They lived at the hotel for nearly a year, and during that time the plaintiff was called upon to and

did perform services that she disliked to perform in connection with the running of the hotel, and at her solicitation they began housekeeping in a small house owned by the defendant in the same town. While they lived at this house the defendant was more or less interested in the hotel and spent a portion of his time in assisting there. When they had lived by themselves for three or four months their child was born in September, 1913. In October following they returned to the hotel, and in the following month the plaintiff's father took her to a hospital in Omaha. She remained there a little more than a month, and her husband brought her back to the hotel. A few days later the plaintiff returned to the home of her father and mother, and after recovering from her illness began this action.

The plaintiff testifies that her compulsory staying at the hotel and her treatment there was the cause of her illness. The defendant and his mother represent that the conduct of the plaiutiff herself and of her parents was the cause of her trouble, and, as we have already suggested, it is difficult to tell from this evidence which party was the most at fault in causing the general conditions that existed. It, however, seems clear from the evidence of the plaintiff and the admissions of the defendant that these unfortunate conditions led the defendant and his mother to suppose that they were justifiable and were required to use force and violence against the plaintiff, which the law will not justify. The plaintiff alleges that, when the defendant took her from the hospital in Omaha, she was not able to travel, and that after he had taken her to the hotel of her mother-in-law he "slapped her because she refused to go out into the cold while she was ill and in a state of nervous collapse, and that the defendant cruelly compelled the plaintiff to go with him." In answer to this allegation, the defendant does not contend that the plaintiff was in good health at the time, or that she desired or was willing to go out of the house upon that occasion, but insists that the local physician and the doctor at Omaha advised it, and says: "The defendant insisted upon plaintiff's getting out on account of her health, and, while trying to get plaintiff properly dressed

so she might go out, the plaintiff bit the defendant and he warded her from injuring him." These physicians, on whose advice he relied, were not present at the time, and it does not appear that they advised him to force her to go out when she herself felt unable to do so. He concedes that he was trying to get her "properly dressed" against her will, and that in doing so he had to do what he did to prevent her from injuring him, and justifies this by saying that before that time she was "getting better under the efforts of the defendant." The defendant was evidently advised by his mother that the plaintiff needed such treatment, and under the influence of his mother he may have thought that it was in the interests of all parties concerned that he should so treat his wife. He should have disregarded such advice. The law does not require the plaintiff to submit to such treatment. It amounts to cruelty.

There are other circumstances of cruelty disclosed in this record. While the plaintiff was holding her infant girl, not yet a year old, in her arms, the defendant took the child from her by force and against her will. These and other acts of violence that are substantially conceded by the defendant justified the plaintiff in returning to her parents and amount to extreme cruelty. The plaintiff should have been granted a divorce.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree of divorce from the bonds of matrimony in favor of the plaintiff, and giving her the custody and care of the infant child. The defendant should pay the costs of these proceedings and a reasonable attorney fee, and the trial court should determine the question of alimony and the support of the child. For this purpose the parties should be allowed to amend their pleadings and introduce further evidence if so advised.

REVERSED.

MORRISSEY, C. J. I dissent from the majority opinion because it does not seem to me to be a fair reflection of the evidence.

LETTON, J., concurs in this dissent.

EVA BELLE HAIGHT, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 1, 1917. No. 19973.

1. **Pleading.** A defendant may plead as many defenses as he has. Allegations of fact showing that the negligence of the plaintiff was the sole cause of her injuries would amount to a specific denial of the allegation that defendant's negligence was the proximate cause.

2. **Negligence:** BURDEN OF PROOF. In an action for damages caused by defendant's negligence, the burden is upon the plaintiff to prove negligence and that it was the proximate cause of her injury. So far as plaintiff's negligence is material, the burden is upon the defendant to make such proof.

3. ———: ———: INSTRUCTIONS. In such action, if defendant pleads in one count, as special denial, facts that are inconsistent with plaintiff's allegations of negligence, and also facts that would amount to negligence of plaintiff, defendant cannot complain of instructions that the burden of proving defendant's negligence is upon plaintiff, and of proving plaintiff's negligence is upon defendant, in the absence of a request for more specific instructions.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

John L. Webster, for appellant.

Weaver & Giller, contra.

SEDGWICK, J.

Plaintiff recovered a judgment for $5,300 for personal injuries alleged to have been sustained by her by reason of the premature starting of a street car while plaintiff was alighting therefrom, and defendant appeals.

The first question presented is upon the instructions, as to the burden of proof in the peculiar condition of the pleadings and evidence.

Plaintiff in her petition in the district court alleged that she became a passenger on one of defendant's cars, and "that after she had boarded said car and gave the conductor

in charge thereof her transfer she requested him to stop said car at the intersection of Yates street with said Sherman avenue for the purpose of permitting her to alight; that when said car approached Yates street said conductor gave the usual and customary signal of one bell to stop the car and said car was thereupon brought to a standstill at about said intersection; that when said car had been brought to a standstill as aforesaid plaintiff passed out the door onto the rear platform for the purpose of alighting from said car; that while in the act of so alighting therefrom, and before plaintiff had a reasonable and sufficient time so to do, and without giving her the necessary and usual time for that purpose, said conductor in charge and control of said car negligently and carelessly, and without any regard whatever for the safety of life and limb of this plaintiff, gave the usual and customary signal to go ahead, to wit, two bells, whereupon said car was suddenly and immediately started forward by defendant, its agents and employees, and plaintiff was thereby jerked, thrown, and dragged down from said car to and upon the pavement."

The defendant's answer denies: "That the car on which the plaintiff was riding started forward while the plaintiff was in the act of alighting therefrom, and denies that the conductor in charge of said car gave any signal for the said car to start forward while the plaintiff was in the act of alighting therefrom, and denies that the said plaintiff was jerked or thrown from the said car, and denies that the defendant, its agents and employees were guilty of any negligence whatever. The defendant for further answer avers the facts to be as follows: That the plaintiff was riding on a car south-bound on Sherman avenue; that the said car was brought to a stop at the regular stopping place at the west side of the intersection of Sherman avenue with Yates street for the purpose of permitting whatever passengers, if any, who desired so to do, to board or alight from the said car; that the said car remained standing at the regular stopping place for a reasonable length of time to permit all passengers, who so desired, to alight from said car; that the

plaintiff herein sat in her seat without manifesting any indication or making any sign that she desired to alight from the said car at the said street intersection; that after the said car had so remained standing at the said street intersection and after it was evident to the conductor in charge of said car that no other persons desired to alight from or board the said car at the said street intersection, the said conductor thereupon signaled the motorman to start the said car; that after the said car had been started forward the plaintiff herein arose from her seat and rushed to the rear platform of the said car and indicated to the conductor that she desired to alight from the said car at Yates street; that, thereupon, the said conductor signaled the motorman to again stop the said car for the purpose of permitting the plaintiff to alight therefrom." The defendant further "avers that whatever injuries, if any, the plaintiff received were the result of her own negligence in alighting from a moving car as hereinbefore more specifically pleaded." The plaintiff for reply denied seriatim the several affirmative allegations of the answer, and denied "that she was guilty of any negligence whatever at the time she was attempting to alight from said car."

A defendant may plead as many defenses as it has. This is by express provision of the statute. Allegations of fact showing that the negligence of the plaintiff was the sole cause of her injuries would amount to a specific denial of the allegation that defendant's negligence was the proximate cause. Such allegations might also amount to a plea that the negligence of the plaintiff contributed to the cause of her injuries, and admit proof of such contributory negligence. It does not seem in the case at bar that the defendant really attempted to plead contributory negligence in a technical sense. The attempt was to plead facts entirely inconsistent with the plaintiff's claim; that is, inconsistent with the idea that the car had stopped and was suddenly started while the plaintiff was trying to get off. The gist of the negligence charged against the defendant is that they suddenly started the car, and the plaintiff ought not to be allowed to recover unless that was the fact, and that is-

sue should have been so submitted to the jury. The burden of proof is upon the plaintiff to show that she attempted to alight from the car while it was standing, and that the defendant started it suddenly while she was doing so, which was the cause of her injury, and the burden to make this proof is upon the plaintiff. Unless she proves this by a preponderance of the evidence we should find for the defendant. That was all the burden of proof that was upon the plaintiff.

In pleading the special denial that the plaintiff was not attempting to leave the car while it was standing still, and that the accident was not caused by the defendant suddenly starting the car while she was alighting, it was not necessary to allege that she negligently did what she did. The denial of the plaintiff's cause of action would be just as effective without the word "negligent" or "negligently." So far as the negligence of the plaintiff was material in this case, the burden of course was upon the defendant to prove such negligence. To illustrate: Suppose that the evidence should turn out to be that the plaintiff was about to get off the car while it was standing still, and that the defendant suddenly started the car before she had alighted, but the plaintiff, knowing that the car was in motion, negligently stepped off the car and so contributed to her injury, then the evidence would show negligence on the part of the defendant in starting the car just as the plaintiff was about to alight, and contributory negligence on the part of the plaintiff in voluntarily getting off the car while it was in motion. In such case, that she did so voluntarily get off while the car was in motion would be for the defendant to prove, and the burden of this proof would rest upon the defendant throughout the trial. Apparently it is to hedge against such a situation that the defendant in such cases insists upon alleging, not only that the accident happened in a different way and at a different place from what the plaintiff alleges, but also that the plaintiff negligently got off the car while it was in motion. If the fact was that she negligently stepped off the car while it was in

motion, then she could not recover, even though the defendant had negligently started the car just as she was about to alight from it. And this is the reason that the defendant charges her conduct to be negligent. It does not seem to be a fair way to plead, and yet no other way is suggested that the defendant could consistently plead so as to avail itself of any situation that the evidence might develop. Such pleading is not to be commended. If the defendant relied upon these allegations as a defense, they might reasonably be presented to the jury in the opening statement of counsel, but can be of no use in the answer, unless the evidence should disclose a situation, as alleged by plaintiff, showing negligence of defendant, and it might become necessary to rely upon contributory negligence as a defense.

If, after the evidence was submitted, the defendant desired to have the case submitted by the instructions upon the theory that, if the jury found the defendant negligent as alleged, they should further consider whether the plaintiff was not also guilty of contributory negligence, the defendant should have offered instructions pertinent to such a theory. No such instructions were offered. The defendant's manner of pleading tends to confuse the issue, and to mislead the plaintiff and the court. After stating the issues at length as presented by the parties, the court said: "If the evidence as to the manner in which the accident occurred preponderates in favor of defendant, or is equally balanced as between plaintiff and defendant, then your verdict should be for defendant." The court then stated that part of defendant's answer which might be construed as pleading contributory negligence, and said: "The defendant has alleged in its answer that her injuries were caused by her own negligence. The burden of proof is on the defendant to prove this allegation by a preponderance of the testimony. Now, if, after a fair and full consideration of all the testimony, you find that defendant has so proved plaintiff's negligence, then your verdict should be for the defendant." The defendant cannot complain of these instructions. The defendant presented seven requests for instructions. The most of these were incorporated in the in-

structions given by the court. They related entirely to the general and special denials of the answer. If given, they would have had no effect but to repeat and emphasize the instruction given by the court: "If the evidence as to the manner in which the accident occurred preponderates in favor of defendant, or is equally balanced as between plaintiff and defendant, then your verdict should be for defendant." There was no attempt to assist the court in presenting the supposed defense of contributory negligence, and defendant ought not to complain of any incomplete presentation of that issue to the jury.

The plaintiff testified fully as to how the accident occurred. She was not supported by any other witness. The defendant quotes the evidence of seven witnesses, some of whom appear to be disinterested. The court instructed the jury: "By a preponderance of the evidence is meant not necessarily the greater number of witnesses, but that amount of evidence which on the whole produces the stronger impression upon the minds of the jury, and convinces you of its truth when weighed against the evidence in opposition thereto." The defendant insists that "the unsupported evidence of the plaintiff is not sufficient to sustain this verdict and judgment in view of the large number of witnesses who impeach the plaintiff on every statement made by her as to the manner in which the accident occurred;" and that "the court should have said to the jury that, where the witnesses had an equal opportunity of seeing and knowing that about which they testified, and are of apparent credibility, then the number of witnesses should be considered, if not controlling." No such instruction was requested by defendant. The writer would hesitate to find that this verdict is sufficiently supported; but a majority of the court are of opinion that the plaintiff's evidence was so direct and consistent that reasonable minds might differ as to its accuracy, and that the court cannot say that the verdict of the jury is clearly wrong.

The judgment of the district court is therefore

AFFIRMED.

LETTON and CORNISH, JJ., not participating.

HAMER, J., concurring in part and dissenting in part.

I concur in the argument contained in the opinion and in the statements contained in paragraphs 1 and 2 of the syllabus. While I think both are to be commended for their clearness of language and their aptness of expression, I am wholly unable to agree with the majority opinion that the judgment should be affirmed. I think the evidence is insufficient to sustain the verdict and judgment of the district court, and for that reason I dissent from the majority opinion, and agree with the personal opinion of its writer that he would "hesitate to find that this verdict is sufficiently supported."

If the burden of proof is upon the plaintiff to establish the allegations in her petition, then when the proof is all in, if the allegations in the petition are not established, it is the duty of the jury to find for the defendant, and it is their duty to do so in any event and without considering any other question. The instruction complained of requires the evidence to preponderate in favor of the defendant or to be equally balanced before there can be a verdict for the defendant. I am opposed to the instruction. I believe it to be wrong. I think the case should be reversed. I think that the jury should have been told in substance that, if upon the whole evidence they were unable to say that the plaintiff's case was established by a preponderance of such evidence, then they should find for the defendant.

LEMUEL JONES V. STATE OF NEBRASKA.

FILED DECEMBER 1, 1917. No. 19734.

1. **Larceny:** SUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and found insufficient to sustain a conviction of the crime of stealing a gelding as charged in the information.
2. ———: FELONIOUS INTENT. To constitute the crime of stealing, there must have existed a felonious intent in the mind of the accused at the time of the taking.

ERROR to the district court for Grant county: JAMES N. PAUL, JUDGE. *Reversed and dismissed.*

P. R. Halligan and *Wilcox & Halligan,* for plaintiff in error.

Willis E. Reed, Attorney General, contra.

HAMER, J.

The plaintiff in error, Lemuel Jones, hereinafter called the defendant, was informed against in the district court for Grant county, on the 12th day of May, 1916, and was charged with stealing a gelding in said county on the 26th day of September, 1915, the personal property of one Emery Preston, and of the value of $85. There was a verdict of guilty, and judgment on the verdict, which sentenced the defendant to be imprisoned in the penitentiary at hard labor for not less than one year or more than ten.

It is conceded by the prosecution that the defendant took the horse under an alleged claim of right, but it is denied that he had such right, and, in an ingenious argument, counsel for the state strenuously endeavor to show that the conduct of the defendant was at least questionable and deficient in explanation.

It is immaterial whether the claim of the defendant to the possession of the horse was well founded, as he might think that the horse was his under the arrangement which he claims to have made with Preston, the main witness for the state, and which arrangement is supported by other testimony. The defendant may have had a right to take the horse, even though the jury might justly reach a different conclusion upon the evidence. In the case tried they were not trying title to the horse. They were trying to ascertain whether the defendant was guilty of the charge made against him. There can be no theft without a felonious intent upon the part of the person charged, and whether there was such intent was the sole question to be determined. The question of the defendant's guilt should not be made to depend upon whether he actually owned the horse and was entitled to its possession. The defendant

cannot be found guilty upon the theory that his title has failed.

It is claimed on behalf of the defendant that the evidence fails to support the verdict, and that the question of the defendant's felonious intent was properly submitted to the jury.

The jury were probably uncertain concerning the guilt of the accused, because they recommended a "light sentence." The jury are not very likely to do that sort of thing in a county where the chief business is to raise cattle and horses, and where every one perhaps feels the necessity of the protection of such property by severity of punishment. The evidence shows that the defendant needed to raise money to assist his sister in defraying the expenses of their mother's last illness and of her funeral. He went to a neighbor named Goslin, and the two consulted together as to what was best to be done. Goslin had a horse which he was willing to sell. He authorized the defendant to sell his (Goslin's) horse for $95, or he was willing to accept the defendant's horse in exchange for his horse, provided the defendant succeeded in selling Goslin's horse and failed to sell his own. Goslin seemed willing to do anything reasonable to help his neighbor out. Goslin turned his horse over to the defendant, and the defendant took the two horses down to Hyannis to meet the horse dealer there, whose name was Preston. Of course, if the defendant had sold his own horse to Preston he could have returned Goslin's horse to Goslin, or if he had sold Goslin's horse to Preston he could then have taken his own horse back and delivered it to Goslin. In any event the money which he was to receive, whether for his own horse or for Goslin's, would be his to use, and there would be no entangling or embarrassing circumstances connected with the transaction. It would then have been a clean deal. Preston insisted on buying both horses, and he put the price at $150 for the two. Preston knew that one of the horses did not belong to the defendant. He testified that Jones so told him, and that Jones "said the man (Goslin) sent him in and he had

a right to sell him." Preston was willing to buy the horses at once, although it was then late in the evening, and he did so, giving his check to Jones for $150. Preston testified that he bought the two horses in the livery barn, and that the defendant said to him that "if I would buy them that night it would be a great accommodation;" that George Galliard "held a lantern and I looked them over." The check given in payment for the horses appears to have been written by the light of a lantern. Preston testified: "George held the lantern while I gave the check." Then Preston took the horses over to his barn, so he testified. Jones testified that he told Preston that he could let him have the brown horse for a lower price than he could sell him the bay; that the brown horse belonged to him and the bay belonged to Mr. Goslin; that Goslin wanted so much, and he had brought the horse in, and "the arrangement was I could take him back or take mine and make myself square with Goslin." Also, he told Preston that Goslin had to have $95. The defendant testified that Preston told him to bring in the horses, "and he asked my price, and I told him, and then he started to jew me down, and I told him the arrangement was that I could take $75 for either horse, and I could take his horse back, and I couldn't sell both horses, and I told him that time and time again, and he kept railing at me and railing at me, and finally I said I was going home if he didn't take them, and he wanted me to take a check, and I finally took his check." Jones appears to have been dissatisfied with the deal which he had made with Preston, and the next morning he went to see him. "Q. Did you have another conversation with him the next morning? A. Yes, sir; and he knew then he had swindled me on the horses, and he said then that $75 was all that the Goslin horse was worth, and if Goslin was any man he would be satisfied. Q. Tell me what you said to him the next morning. A. I said I would give him $80 for either one of them back, I was afraid Goslin wouldn't be satisfied, and he said if the horses was there I could have them, and he said they was out at the Rangers Station, and if the old man was there I could leave the

money with him and take the horse." Will Dent testified that he saw Jones talking with Preston; that he heard part of the conversation: "Mr. Jones wanted a horse of Preston that Preston had bought of him, and he offered some price, and Mr. Preston said the horse wasn't here, but it was out at the Rangers Station, and he told him if it was here he could get it, and he said it was out at the Rangers Station, and he could get it there and leave the money with the man out there." The defendant testified that the Rangers Station was on his way home. He appears to have gone to the house at the Rangers Station as he went home, and he went out in the pasture and caught his horse and brought him back to the wagon and fed him, and then hitched him up and took him home. He took the horse in the presence of others. He testified that he intended to go to the post office the next morning and register the money back. He appears to have stayed at Jackson's that night, and it was late when they got there, and it was 8 o'clock in the morning before anybody woke up; that he didn't have any saddle to ride, and he knew the mail would be gone before he could get it there; that he was going to send the money from the Eddie post office.

When he got back he seems to have gone to see Goslin. He told Goslin he had brought his (Jones') horse back. Preston went to see Jones. Jones describes his interview with Preston as follows: "He said, 'Good morning,' and I said, 'Good morning,' and he said he came for the brown horse, and I said he couldn't have him unless he settled with Mr. Goslin, and I said, 'Here is your money,' and he said, 'I bought that horse and I am going to have him.'" Preston then seems to have called for White, and he told White that Jones had lied about the horse, and that Jones did not intend to turn him over unless Goslin said so. "He said all he wanted was to have a witness that I wouldn't turn him over. Q. Did you offer him the money again? A. Yes, sir; after they got in the automobile and started the engine, but had not started the wheels, I said 'Here is your money.'"

Jones then testifies that the transaction was on the night of the 24th, the same night as Home Day, and that he saw Preston the next morning and told him that he wanted one of the horses back, and that Preston told him that he could have one of them, and said that if the horse was there he could have it, but that the horses were not there; that they were at the Rangers Station, and "he said I could get the horse and leave the money with the old man. * * * I told him I would give him $80 for one of them. Q. Did you say which one? A. No, sir. * * * Q. And when you took a horse out of the pasture to replace Goslin's horse you took your horse? A. Yes, sir. Q. You were making the selection of the horse you was to take? A. The only one Preston would make an offer on singly was Goslin's horse, and I supposed that was the one he wanted." He testified also that he got the check cashed on the 25th. "Q. Did you have the money when you talked about paying him $80? A. I think I did." He testified he looked for the old man out at the place, and that the old man said he would be there; that he saw the old man as he went out, but that the old man was not there when he got there. He explained that he did not leave any word with anybody at the place because there was nobody there. Jones appears to have been ashamed of the transaction. He testified: "Q. You sort of evaded the answer; you didn't tell them that you had sold these horses, but that you were taking one back? A. No, I was ashamed of my deal, I had been skinned too bad. * * * Q. How much money did you offer him back? How much did you tender him? A. Just the amount of the Goslin horse. Q. How much was that? A. $75." Goslin testified to the arrangement made between himself and the defendant Jones, and that, when Preston came and met Jones and said that he came after the horse, Jones said: "The horse is Goslin's and you can settle with him. * * * He had a roll of bills, and he said, 'Here is your money.'" The testimony of the defendant concerning the arrangement to go out and get the horse does not seem to be clearly denied, and Preston admits there was talk about taking one of the horses back. While

he did not find the old man at the house, and so did not give him the money, he took the horse in the presence of one Jackson, and there was no concealment of the taking.

Instruction No. 7 reads as follows: "You are instructed that in this case, in order to convict the defendant of the crime charged in the information, you must find from the evidence, beyond a reasonable doubt, that at the time of taking said gelding defendant then and there intended to deprive the owner of said property permanently and to convert it to his own use and benefit." This instruction omits the necessity of finding a felonious intent in order to justify a verdict of guilty, and it authorizes the jury to find the defendant guilty without proof of such intent. *Dobson v. State,* 61Neb. 584; *Wallace v. State,* 91 Neb. 158; *Mead v. State,* 25 Neb. 444. In *Dobson v. State, supra,* the court instructed the jury, in substance, that if Dobson took the calf into his possession and sold and delivered the same to Jerry Kelly, with the intention then and there to convert said calf to his own use, and to permanently deprive the owner thereof of said property, then you are instructed that such action would constitute a larceny of said calf. In the syllabus it was said: "An instruction whereby the whole case is attempted to be covered, but which omits an essential element, is erroneous, and is not cured by another instruction which covers the point." In *Mead v. State, supra,* the instruction said nothing about felonious intent, but did say: "With the intent to permanently deprive the owner thereof of his property."

When the defendant took the horse he is shown by the evidence to have believed that Preston had authorized him to do so. In that event he could not have had any felonious intent. *Mead v. State,* 25 Neb. 444; *Wallace v. State,* 91 Neb. 158; *Bartels v. State,* 91 Neb. 575.

We have carefully examined instructions Nos. 5 and 8, and the argument of counsel for the state concerning them. No. 5 makes the guilt to depend upon the "intent of permanently converting it (the property) to a use other than that of the owner." No. 8 devotes five typewritten lines to "asportation or carrying away," and says that the tak-

ing of an article is feloniously accomplished by holding, grasping, seizing, or taking possession of it, but nothing is said in that part or in the latter part as to what sort of purpose constitutes a felonious intent, and the jury are not instructed concerning the subject.

Preston, in the presence of Dent, seems to have told Jones that he (Jones) could go out to Rangers Station and take one of the horses, leaving the money with the old man in charge. Jones and Dent so testified, and even Preston admits there was talk about Jones taking back one of the horses. Jones caught one of the horses and took it in the presence of Jackson. While he did not leave the money, as he alleges because there was no one there to receive it, he has since been trying to pay it to Preston, who refuses to accept it. When Preston went to Jones' house the horse was there, and Jones and his brother promptly said so. Jones did not try to run the horse out of the country, nor is it shown that he tried to sell it, or otherwise dispose of it. Neither did he slink away or try to conceal himself, and when Preston talked of arresting him, and charged him with being a thief and became somewhat obtrusive, Jones met him more than half way, and Preston appears to have thought he was compelled to defend himself by the use of a board which he held up in front of him as a guard against Jones' threatened attack. Because of the giving of the above instruction, and because the evidence wholly fails to establish a felonious intent on the part of the defendant, the judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

CHARLES MEYERS, APPELLEE, v. GERMAN FIRE INSURANCE COMPANY ET AL., APPELLANTS.

FILED DECEMBER 1, 1917. No. 19634.

1. **Insurance:** ADDITIONAL INSURANCE. The rule that the taking of additional insurance on property insured, without the consent of the company, renders the policy void is not obviated by the fact that the original insurance is on a class of property, rather than any particular property.
2. ———: UNEARNED PREMIUM. "When an insurer has elected to treat a policy of insurance as void for breach of condition providing for a forfeiture, the assured has no claim upon the company for any unearned premium." *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488.
3. ———: POLICY: CONSTRUCTION. What is known as the "*pro rata* clause" in a policy of insurance, providing that concurrent insurers of the property shall share the loss, if any, applies only in case the defendant's policy is valid, and does not constitute a waiver of a provision for forfeiture in case of additional insurance being taken without the consent of the company.

APPEAL from the district court for Valley county: JAMES N. PAUL, JUDGE. *Reversed.*

Stout, Rose & Wells and *E. P. Clements*, for appellants.

E. J. Babcock and *A. Norman, contra.*

CORNISH, J.

Defendant appeals from a judgment in suit on a fire insurance policy.

It appears that, without the knowledge or consent of defendant, plaintiff violated the forfeiture provision against additional insurance. In the absence of waiver, this rendered the policy void or voidable at the instance of the insurance company. *Hughes v. Insurance Co. of North America*, 40 Neb. 626; *Home Fire Ins. Co. v. Wood*, 50 Neb. 381; *Slobodisky v. Phœnix Ins. Co.*, 52 Neb. 395; *Nebraska Mercantile Mutual Ins. Co. v. Sasek*, 64 Neb. 17.

It is argued that if the facts of the case do not bring it within the reason and purpose of the rule—the mischief intended to be met by it—the rule does not apply. This is true. It is said that there could be no such thing as over-insurance in this case because no particular property was insured. Being blanket insurance on horses, cattle, hay, etc., of which the insured might have much or little at the time of the fire, the recovery being limited to actual value regardless of the amount of insurance, it is thought additional insurance could not profit the insured, but rather the insurer because of its right to prorate.

Let us consider this argument. The courts have always held that, regardless of the amount, number, or kind of policies, or even of the insertion of this provision, the contract being one of indemnity only, the total recovery is limited to actual loss. *German Ins. Co. v. Heiduk & Skibowski,* 30 Neb. 288; 19 Cyc. 892.

Why is the provision against over-insurance considered material to the risk and enforceable? Is it not because additional insurance increases the moral hazard? The more insurance, the less care to protect and save the property, and, as stated in *Hughes v. Insurance Co. of North America, supra*: "It is designed as a check upon the disposition of the evil-minded to over-insure their property and destroy it." In this case plaintiff was also proceeding against the other company. This increased risk applies to one kind of insurance about the same as to another.

The argument proves too much. Why take additional insurance unless with the expectation of either collecting on both policies or relinquishing the first one? If we could assume that the plaintiff and others over-insuring in this case would know that they could not profit by it, either lawfully or by unlawful means, then the argument would be good. This cannot be assumed as a fact. The provision being material to the risk, good faith or mistake in a particular case could make no difference. 19 Cyc. 767.

The fact that some investigation of loss was made by the defendant is not evidence of waiver. At least this is true when considered in connection with the non-waiver agree-

ment introduced in evidence by plaintiff. *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Neb. 43.

The failure of the insurance company to return the consideration of the policy before standing upon its terms does not constitute a waiver. The company does not fail in its promise by insisting on the conditions of its policy: "Not having broken its contract, it has a right to retain the consideration." *Schmidt v. Williamsburgh City Fire Ins. Co., supra* (p. 51). See, also, *Farmers Mutual Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488; *Farmers Mutual Ins. Co. v. Phœnix Ins. Co.*, 65 Neb. 14.

The "*pro rata* clause" in the policy, providing that concurrent insurers of the property shall share the loss, if any, applies only in case the defendant's policies are valid. It applies where the provision against additional insurance has been complied with by making a written indorsement on the policy consenting to such additional insurance, or where the breach of the provision has been waived. It does not constitute a waiver.

An examination of the evidence does not show that the defendant at any time waived the forfeiture provision of the policy. On the contrary, after learning of the forfeiture it at all times treated the policy as not in force.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE and SEDGWICK, JJ., not sitting.

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12. If the motion for a new trial does not challenge the attention of the trial court to the inadequacy of the verdict, the point will not be considered on appeal. *Fairchild v. Wilson* 608
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3. Compliance with the statute is requisite to an attorney's lien. *Vanderlip v. Barnes* 573

Bankruptcy.

A preferred creditor is chargeable with notice of facts which a reasonable inquiry might be expected to disclose, though it is not necessary under the bankrupt act that the creditor should know or believe that the debtor was insolvent. *Walter v. National Fire Ins. Co.* 639

Banks and Banking. See MANDAMUS.

1. In an action by the receiver of an insolvent national bank to collect a stock assessment, the value of property delivered by a stockholder to the receiver to be credited on any subsequent assessment may be set off, where the receiver refused to return it and has turned it into the bank's assets. *Cole v. Adams* 21
2. Where one in good faith places money on interest in a state bank subject to check, it is a deposit, and is a charge against depositors' guaranty fund. *Central State Bank v. Farmers State Bank* 210

Banks and Banking—*Concluded.*

3. A "depositor" is one who delivers to or leaves with a bank money subject to his order, either upon time deposit or subject to check. *Farrens v. Farmers State Bank* 285
4. A director of a state bank, as to his deposit, is in the same position as any other depositor. *Farrens v. Farmers State Bank* 285
5. Money placed in a state bank as a purported deposit, with understanding that the bank will pay a bonus thereon above the lawful rate of interest, *held* not to be a deposit within the bank depositors' guaranty act, but a mere loan. *Iams v. Farmers State Bank* 778
6. Where a state bank fails and a receiver is appointed, certificates of deposit in fact representing a loan cannot be paid out of the depositors' guaranty fund. *Iams v. Farmers State Bank* 778
7. Change in corporate name of a bank in no way affects the nature of transactions therewith. *Iams v. Farmers State Bank* 778

Bastardy.

Evidence of unchastity, outside the period of gestation, *held* irrelevant. *Bailey v. Hurtt* 823

Bills and Notes. See PLEADING, 5, 6.

1. Under sec. 5354, Rev. St. 1913, an indorsement, "Pay to any bank or banker. All previous indorsement guaranteed"—is not a restrictive indorsement. *National Bank of Commerce v. Bossemeyer,* 96
2. Where one deposited a sight draft with bill of lading attached, and it was indorsed generally and sent to a correspondent bank, which gave credit to the remitting bank, without knowledge of its custom to give the depositor credit on his checking account, *held* that the receiving bank was a holder for value in due course and entitled to recover from the drawer. *National Bank of Commerce v. Bossemeyer* .. 96
3. If plaintiff has no interest in a note sued upon except as collateral security for a note held by him, he cannot recover on the collateral if the principal note is invalid. *Omaha Loan & Building Ass'n v. Cocke* 750
4. In an action on notes and a mortgage, evidence *held* to sustain finding that notes were obtained by false representations. *Greiner v. Lincoln* 771

Bonds. See COUNTIES AND COUNTY OFFICERS, 1, 2.

Carriers. See EVIDENCE, 4.

1. Under sec. 6162, Rev. St. 1913, the duty to promptly deliver cars is not ended when they are placed on a "hold track"

Carriers—*Concluded.*

to await orders, but time allowed for delivery is only suspended while cars are so held. *Sunderland Bros. Co. v. Missouri P. R. Co.* 119

2. Both shipper and carrier must comply with published tariff rates and regulations, and erroneous statements of the carrier or its construction of the regulations as to refunds in other cases are immaterial. *Fremont Milling Co. v. Chicago & N. W. R. Co.* 362
3. A milling in transit rate is an entirety, and must be accepted and carried out in its entirety or not at all. *Fremont Milling Co. v. Chicago & N. W. R. Co.* 362
4. A shipper cannot sue in Nebraska for unused transit credit on shipments from points in Nebraska to points outside and to one point in Nebraska, where parts of each car were forwarded indiscriminately to points of destination, and where milling in transit privileges have not been complied with. *Fremont Milling Co. v. Chicago & N. W. R. Co.* 362
5. Under bill of lading requiring notice of claim for "damages for loss of or injury to" live stock, notice is not required where the claim is for damages for loss of a favorable market, shrinkage, and expense caused by delay in transportation. *McElwain v. Union P. R. Co.* 484
6. Where there is proof of unreasonable delay in shipment of live stock, the burden is on carrier to prove that delay was not caused by its negligence, though owner accompanied the shipment. *McElwain v. Union P. R. Co.* 484
7. A corporation organized under the general railroad statutes, with authority to construct and operate a railway between two cities for performing all the duties of a common carrier, is a "railroad company," within sec. 6052, Rev. St. 1913, regulating the liability of such companies for injuries to passengers. *Webb v. Omaha & S. I. R. Co.* 596
8. In an action for damages for loss of shipment, evidence *held* not to sustain finding for plaintiff. *Meyer v. Chicago & N. W. R. Co.* 756
9. In an action for damages caused by carrier's negligence, the burden is on plaintiff to prove negligence, and that it was the proximate cause of her injury; but, as to plaintiff's negligence, the burden is on defendant. *Haight v. Omaha & C. B. Street R. Co.* 841

Commerce.

The reciprocal demurrage act (Rev. St. 1913, secs. 6159-6167), as applied to commerce within the state, is not unconstitutional. *Sunderland Bros. Co. v. Missouri P. R. Co.* 119

Common Law.

Under sec. 3697, Rev. St. 1913, any provision of the common law of England inconsistent with any law passed by the legislature is not the law of this state. *Moran v. Moran* 386

Constitutional Law. See COMMERCE. MUNICIPAL CORPORATIONS, 4.

1. Sec. 7732, Rev. St. 1913, as amended by ch. 145, Laws 1915, requiring plaintiff to be a *bona fide* resident for six months preceding filing of petition in attachment, is not violative of sec. 2, art. IV of the federal Constitution providing that citizens of each state shall have the privileges and immunities of citizens of the several states. *Tanner v. DeVinney* .. 46
2. Advisability of conferring upon a city power to levy a tax for corporate purposes is a question of public policy for the legislature. *Sinclair v. City of Lincoln* 163
3. Tax by city of Lincoln for university campus extension being levied for a corporate purpose, secs. 1, 4, art. IX, state Const., and amendment 14, Const. U. S., have no application. *Sinclair v. City of Lincoln* 163
4. An ordinance defining garbage and prohibiting its removal by any one not employed by the city *held* not unconstitutional. *Urbach v. City of Omaha* 314
5. Parties whose constitutional rights are not affected will not ordinarily be permitted to challenge the constitutionality of a law. *Urbach v. City of Omaha* 314

Continuance.

1. Ordinarily a party who fails to issue a subpœna for a witness and relies upon his promise to appear has not exercised such diligence as requires a continuance if the witness fails to appear. *Jackson v. Omaha & C. B. Street R. Co.* 456
2. Nonattendance of witnesses subpœnaed by plaintiff is not ground for a continuance at request of defendant who relied upon plaintiff's efforts to procure their attendance. *Jackson v. Omaha & C. B. Street R. Co.* 456

Contracts. See HUSBAND AND WIFE, 1.

1. Where the terms of a contract are ambiguous, the interpretation placed thereon by the parties is conclusive as to their respective rights. *Katz-Craig Contracting Co. v. City of Cozad.* 189
2. An agreement entered into without consideration is unenforceable. *Western Brick & Supply Co. v. Mid-West Construction Co.* 254

Corporations. See CREDITORS' SUIT.

Costs.

1. After acceptance of amount of the judgment and costs, it is too late to ask for attorney fees. *Lawler v. American Surety Co.* 741
2. A motion to retax costs is unnecessary to review a judgment awarding an attorney fee in an action on an insurance policy. *Bruner Co. v. Fidelity & Casualty Co.* 825

Counties and County Officers.

1. A county board in letting contract for construction of county building must take a bond of the contractor, conditional as required by sec. 3840, Rev. St. 1913. *Concrete Steel Co. v. Rowles Co.* 400
2. A contractor for construction of a public building, who purchased material from a dealer and paid therefor in good faith, without notice of liability of dealer, is not liable on his bond, given under sec. 3840, Rev. St. 1913, to the manufacturer from whom the dealer purchased such material. *Concrete Steel Co. v. Rowles Co.* 400
3. Under sec. 1955, Rev. St. 1913, fixing terms of county commissioners, two commissioners should be elected in 1916, if terms of two have expired or will expire in the succeeding January. *State v. Smith* 805
4. In a county having three commissioner districts, where the full term for which one commissioner was elected would expire January, 1917, his successor should have been elected in 1916, if two commissioners elected in 1914 were holding office. *Cavey v. Reigle* 807
5. In counties having three commissioner districts, sec. 1955, Rev. St. 1913, fixes terms of four years from January, 1915, for two commissioners, and four years from January, 1917, for one commissioner, and succeeding terms will be for four years. *Cavey v. Reigle* 807

Courts. See DESCENT AND DISTRIBUTION, 2, 4. JUDGMENT, 6.

Creditors' Suit.

Stockholders who appropriated the proceeds of all property of an insolvent corporation *held* accountable to the corporation's creditors. *Lingle v. Farmers Mutual Telephone Co.* . . . 753

Criminal Law. See ADULTERY. BASTARDY. HOMICIDE. INDICTMENT AND INFORMATION. LARCENY. RAPE.

1. An extrajudicial confession is not of itself sufficient evidence to establish *corpus delicti*. *Cryderman v. State* 85

Criminal Law—*Continued.*

2. If the evidence other than the extrajudicial confession of accused establishes the killing of a human being by violence not self-inflicted, the *corpus delicti* is proved. *Cryderman v. State* 85
3. It is only when the same matter is in issue that the accused is twice put in jeopardy for the same offense. *Koenigstein v. State* 229
4. Under the general allegation of an indictment that the accused received a bribe from a keeper of a disorderly house, it may be shown that he had a system requiring all disorderly houses to pay him money to prevent prosecution. *Koenigstein v. State* 229
5. On a trial for receiving a bribe from a keeper of a disorderly house, *held* that evidence of receipt of a bribe from the keeper of another such house is admissible to show a general system under which the bribe was received; but that accused should have been permitted to show in rebuttal his acquittal on a trial for that offense. *Koenigstein v. State*.... 229
6. The jury must determine the issues submitted solely upon the evidence admitted in open court on the trial. *Koenigstein v. State* 229
7. Where a juror assumes to state facts not in evidence and which might influence the verdict, such misconduct will require a new trial. *Koenigstein v. State* 229
8. In a prosecution for unlawfully receiving property with felonious intent, evidence *held* insufficient to sustain a conviction. *Hodge v. State* 419
9. Where the jury panel in a felony case was exhausted and the court, under sec. 8143, Rev. St. 1913, directed that jurors be summoned from "bystanders," and no objection to the order nor to a juror so drawn was made until after verdict, the giving of the direction was error without prejudice. *Jordan v. State* 430
10. When the sheriff is a witness for the state, it is not ordinarily error for the court to refuse to exclude him from the courtroom during examination of other witnesses. *Jordan v. State* 430
11. Where it appears that questions to a witness and his answers thereto were not prejudicial to accused, error in asking leading questions will not require a reversal. *Jordan v. State,* 430
12. Argument of county attorney *held* not so prejudicial as to require a reversal. *Jordan v. State,* 430
13. Evidence *held* to sustain conviction of murder in first degree. *Jordan v. State* 430

Criminal Law—*Continued.*

14. Attorney appointed to assist county attorney *held* not disqualified under sec. 5601, Rev. St. 1913. *Jordan v. State* .. 430
15. Order permitting accused to interview state's witnesses, leaving it optional with them whether they should submit to such an interview, *held* to fully protect accused in his rights. *Jordan v. State* 430
16. A statement of facts will not be considered as a confession of guilt, unless it is first shown to have been voluntarily made. *Cheney v. State* 461
17. Where transcript of record in justice court shows that accused waived preliminary examination, and it is claimed there was no such examination, the question should be raised by plea in abatement. *Gammel v. State* 532
18. Adultery may be established by circumstantial evidence. *Reinhardt v. State* 667
19. Verdict will not be set aside for want of evidence, unless it is clearly insufficient. *Reinhardt v. State*..... 667
20. Counsel must make his objections specific, and, unless prejudicially erroneous on the point presented, admission of evidence will not be held prejudicially erroneous for reasons not suggested at the trial. *Havlicek v. State* .....?..... 782
21. Question of failure to give a preliminary hearing is not raised by a special appearance objecting to jurisdiction. *Havlicek v. State* 782
22. In a prosecution for wife abandonment, evidence that after abandonment accused procured a divorce is admissible. *Havlicek v. State* 782
23. To sustain a conviction under sec. 8614, Rev. St. 1913, for wife abandonment, the state must prove that accused has available means for her support, or earning capacity, and that he refused, without good cause, to provide for her. *Havlicek v. State* 782
24. In a prosecution for wife abandonment, where it is shown that prior to his departure accused had steady employment at remunerative wages, the state is not required to prove that he had means after his departure. *Havlicek v. State* 782
25. In a prosecution for wife abandonment, the husband's lack of means, or failure to secure employment, is matter of defense. *Havlicek v. State* 782
26. Instructions which give the impression that conviction of accused is of more importance than the acquittal of the innocent are erroneous. *Koenigstein v. State* 229
27. It is not error to refuse a requested instruction as to matter covered by an instruction given. *Samuels v. State* 383

Criminal Law—*Concluded.*

28. Where the charge, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete. *Samuels v. State* 383
29. Instruction as to reasonable doubt *held* prejudicial. *Hodge v. State* 419
30. Cautionary instruction as to testimony of officers *held* free from error of which accused might complain. *Jordan v. State,* 430
31. On a trial for rape upon a female under 15, where the evidence as to her age and chastity was conflicting, refusal of instruction as to burden on state of proving her previous chastity *held* error. *Gammel v. State* 532
32. Instruction as to "reasonable doubt" *held* erroneous. *Gammel v. State* 538
33. An instruction as to the weight and credibility of the evidence of police officers *held* not prejudicially erroneous. *Romero v. State* 650
34. Instruction by the court of its own motion relative to weight of evidence *held* not prejudicial to accused. *Reinhardt v. State* 667

Damages.

1. Verdict of $17,500 for injury to foot *held* excessive. *Stapleton v. Chicago, B. & Q. R. Co.* 201
2. Verdict of $9,625 for fracture of the femur *held* excessive. *Ryba v. Swift & Co.* 216
3. Verdict of $20,000 for permanent injury to spine *held* excessive. *Wright v. Omaha & C. B. Street R. Co.* 292
4. Damages for permanent personal injuries impairing earning capacity should be based on the probable expectancy of plaintiff's life immediately before the injury, but damages for future mental and physical suffering should be considered in connection with the probable expectancy of plaintiff's life in his injured condition at time of trial. *Webb v. Omaha & S. I. R. Co.* 596

Deeds.

1. Sec. 6195, Rev. St. 1913, providing that every conveyance shall be so construed as to carry into effect the intent of parties, applies to deeds. *Moran v. Moran* 386
2. Deed construed, and *held* to convey to grantee a life estate, with a remainder to his heirs. *Moran v. Moran* 386

Descent and Distribution. See WILLS, 15.

1. Proceeds of realty *held* not ancestral property, but to be distributed under sec. 1275, Rev. St. 1913, as other personal property. *In re Estate of Howe* 380
2. The county court has jurisdiction to determine who are heirs of a decedent. *State v. Keller* 552
3. A finding in a decree for final distribution that a certain person is the sole heir and an order assigning the estate to him complies with secs. 1494, 1495, Rev. St. 1913, and is a sufficient adjudication of heirship. *Fischer v. Sklenar* 553
4. The probate court in adjudicating heirship does not determine title to realty, as the statute of descent passes title upon the fact found. *Fischer v. Sklenar* 553
5. Adjudication of heirship by the probate court is binding upon all parties interested in the estate, unless it is set aside on appeal. *Fischer v. Sklenar* 553

Divorce.

1. Under sec. 1571, Rev. St. 1913, personal service of summons outside the state in a divorce action properly brought in the state is sufficient. *Williams v. Williams* 369
2. Evidence *held* sufficient to sustain a decree of divorce for nonsupport. *Williams v. Williams* 369
3. Under sec. 1571, Rev. St. 1913, the district court has jurisdiction to grant a divorce in any county where the parties, or one of them, reside. *Williams v. Williams* 369
4. Preliminary to an order appointing a receiver of a husband's property under sec. 1589, Rev. St. 1913, there must be an order requiring the husband to give security for payment of alimony, and a refusal on his part to give such security. *Ford v. Ford* 648
5. An order vacating a decree of divorce after the term, but within six months of its rendition, *held* not a final order, and to be within the jurisdiction of the court. *Everson v. Everson* 705
6. In a suit for divorce, defendant may plead in abatement another action pending between the same parties and for the same cause, and the court has jurisdiction to determine that issue. *Flaxel v. Flaxel* 799
7. In a suit for divorce, where defendant failed to plead pendency of another suit for the same cause, or to defend against a motion for suit money, a final order for suit money will not be reversed on appeal. *Flaxel v. Flaxel* 799
8. Intermeddling of third parties will not justify husband in using personal violence against his wife. *Unzicker v. Unzicker* 837

Divorce—*Concluded.*

9. The law does not allow a husband to use personal violence against his wife even for her own good. *Unzicker v. Unzicker* 837

Ejectment.

Ejectment will lie to recover land occupied by an encroaching structure of an adjoining proprietor. *McDivitt v. Bronson*.. 437

Elections.

Under secs. 2095, 2124, Rev. St. 1913, in an election contest because sufficient votes to change the result were illegally counted for contestee, contestant may put in evidence properly preserved ballots, without first making proof of his charges, where such ground is specifically alleged. *Frum v. Leamer* 675

Equity.

One in possession of land may rest in security until his title or possession is attacked, and a failure to appeal to equity during that period will not prejudice his right either to quiet title or to assert an equity against the holder of the legal title. *McNea v. Moran* 476

Estoppel. See INFANTS.

Evidence. See APPEAL AND ERROR, 14, 22-28. CARRIERS, 6, 8, 9. CRIMINAL LAW. STATUTES, 4. WILLS, 1-6, 9, 12-14. WITNESSES.

1. Knowledge on which a witness as to market value of realty bases his opinion acquired long after the rights of the parties became fixed is too remote. *Willman v. Sandman* 92
2. In an action for contribution against a cosurety, parol evidence is admissible to show the actual relation of the parties to the obligation discharged. *Frew v. Scoular* 131
3. Where a transcript of proceedings on an administrator's sale, introduced without objection, showed written consent to the sale by remaindermen, then minors, but the original document was not introduced, it will be presumed that the written consent was genuine. *Criswell v. Criswell* 349
4. Opinion testimony of qualified witnesses, as to shrinkage of cattle held two days at destination, is admissible to prove claim for shrinkage. *McElwain v. Union P. R. Co.* 484
5. Declarations derogatory to title of ancestor, made by him after he transferred title, are not admissible as exception to hearsay rule merely because grantee acquired the property without monetary consideration. *Johnson v. Petersen* 504

Evidence—*Concluded.*

6. Declarations against pecuniary interest of declarant when made may be admissible after his death. *Johnson v. Petersen* 504
7. While entire statement in connection with a declaration against interest may be admissible as exception to hearsay rule, such parts as are not against his pecuniary interest may be entitled to little credit, where in those respects he had strong motives for misrepresentation. *Johnson v. Petersen* 504
8. Photographs of place of accident, taken two years afterwards, and after the surroundings had been materially changed, are not ordinarily admissible in evidence. *Tankersley v. Lincoln Traction Co.* 578
9. The opinion of a nonexpert witness as to genuineness of a disputed signature may be rejected, if based alone on a comparison of disputed and genuine documents in evidence; the jury being as competent in such respect as the witness. *In re Estate of O'Connor* 617
10. Where a witness is shown to be absent from the state, his testimony at a former trial of the same cause between the same parties is admissible, if otherwise unobjectionable. *In re Estate of O'Connor* 617
11. Where circumstances justify the reading of testimony of an absent witness, all of his testimony on a former trial may be read, if otherwise admissible, though his cross-examination might have been waived had he been present at the second trial. *In re Estate of O'Connor* 617
12. Refusal to permit a witness to identify a disputed signature of a decedent was not abuse of discretion, where proper foundation had not been laid. *In re Estate of O'Connor*..... 617
13. In the contest of a will for forgery, the value of expert testimony on handwriting depends on the reasons for the opinion, and its weight and the credibility of the witnesses are for the jury, where there is a conflict. *In re Estate of O'Connor* 617
14. The question of marketability of title is generally a question of fact; but, when questions of law are involved, expert testimony is peculiarly applicable. *Farmers State Bank v. Butler* 635

Execution.

Property not exempt, acquired after judgment, may be sold upon execution to satisfy the judgment. *Miller v. Miller*.... 405

Executors and Administrators. See PARTNERSHIP.

1. No appeal is allowed from the appointment of a special administrator under sec. 1341, Rev. St. 1913, but an appeal is allowed from an appointment under sec. 1381, by the general provision for appeals from orders of the county court. *In re Estate of Enyart* 25

Executors and Administrators—*Concluded.*

2. An administrator cannot appeal from the final order of distribution unless he is pecuniarily affected in his representative capacity. *In re Estate of Craig* 439
3. An administrator who without an adjudication of heirship distributes the residue of the estate assumes responsibility of making distribution to the proper persons. *In re Estate of Craig* 439
4. An administrator who without an order naming the distributees distributes the proceeds of a judgment recovered for the death of the intestate cannot in his representative capacity appeal from a final order directing distribution to others. *In re Estate of Craig* 439

Exemptions. See HOMESTEAD, 1, 2.

Forcible Entry and Detainer.

In an action of forcible detainer, the only issue is the right of possession. *Van Sant v. Beuder* 680

Fraud.

1. Evidence in an action for fraud *held* insufficient to sustain verdict for plaintiff. *Willman v. Sandman* 92
2. In an action for fraud in the sale of stock of an oil company, verdict for plaintiff *held* inadequate as not responding to the evidence. *King v. Day* 346
3. Representations which lead a party to suppose existence of certain facts, if made designedly and fraudulently, are fraudulent misrepresentations. *Hlavaty v. Blair* 414

Fraudulent Conveyances.

1. When there is no mutual fraudulent intent, any person, solvent or insolvent, may dispose of his property for a valuable consideration, which may be future services agreed upon between the parties. *Vanderlip v. Barnes* 573
2. A conveyance of land between near relatives will be closely scrutinized to discover if it was made to hinder, delay, or defraud subsequent creditors of the vendor. *Tanner v. Frink* 660
3. The wife will not be chargeable with the fraudulent intent of her husband, unless she had guilty knowledge of the intended fraud. *Tanner v. Frink* 660

Garnishment.

1. Under sec. 7746, Rev. St. 1913, a debt of an Illinois corporation payable in that state to another Illinois corporation may be subjected by garnishment in Nebraska to the payment of a debt owing to a resident of Iowa. *Morrison v. Illinois C. R. Co.* 49

Garnishment—*Concluded.*

2. Where a citizen of Iowa brought an action against an Illinois corporation by attachment and garnishment of two Illinois corporations for personal injuries sustained in Iowa, *held* that the trial court had jurisdiction. *Morrison v. Illinois C. R. Co.* 49

Homestead.

1. The liability for alimony is not a contract liability, and a government homestead is not exempt by sec. 2296, Rev. St. U. S. 1878, from levy upon a judgment for alimony. *Miller v. Miller* 405
2. Exemption of a homestead is limited to 160 acres occupied as a family home. *Miller v. Miller* 405
3. Occupancy of wife's property as a home is evidence of its homestead character, but is not conclusive. *Zeng v. Jacobs* 645
4. Where occupancy of the wife's property was temporary, and was thereafter abandoned, and she had never consented to its selection as a family homestead, the husband acquired no homestead right therein. *Zeng v. Jacobs*..... 645
5. Temporary absence from the home does not amount to abandonment of homestead right therein. *Zeng v. Jacobs*..... 645
6. Evidence *held* to show abandonment of homestead. *Zeng v. Jacobs* 645

Homicide. See CRIMINAL LAW, 1, 2, 13.

1. Under sec. 9179, Rev. St. 1913, it is the duty of the supreme court to determine from the evidence whether the death penalty for murder is warranted. *Cryderman v. State* 85
2. Where the evidence showed that the mind of accused, convicted of murder in the first degree, was not normal and that there was no rational motive for the crime, the death penalty will be reduced to imprisonment for life. *Cryderman v. State* 85
3. When two or more by common design enter upon a burglary, armed and prepared to kill if opposed, and where one of them trying to escape kills one trying to arrest him, all are equally guilty of the homicide, though such killing was not part of the prearranged plan. *Romero v. State*..... 650
4. Identification of accused as the person who committed the felony charged *held* sufficient. *Hauser v. State*..... 834

Husband and Wife. See CRIMINAL LAW, 22-25.

1. The Nebraska statute limiting the right of married women to contract does not apply to a note executed in and governed by the laws of another state. *Farmers State Bank v. Butler* 635
2. The wife is not a necessary party to an action by the husband to recover damages for the taking of his land under right of eminent domain. *McCullough v. St. Edward Electric Co*..... 802

Indictment and Information.

1. The court in its discretion may permit the county attorney after commencement of trial to indorse on the information the name of an additional witness. *Samuels v. State* 383
2. Under sec. 8579, Rev. St. 1913, procuring and abetting commission of felony is a distinct offense, and on an information therefor accused cannot be convicted of the principal offense; but there may be a conviction of the crime charged, though the evidence would also convict of the principal offense. *Guignon v. State* 587
3. Where the information alleges facts showing that the crime charged was committed in the county of the trial, it will not, after conviction, be held insufficient for not formally stating the venue; no objection being made before trial. *Guignon v. State* 587

Infants.

Minor remaindermen coming of age must affirm or disaffirm an administrator's sale and failure to disaffirm within a reasonable time will estop them from disputing the purchaser's title. *Criswell v. Criswell* 349

Injunction. See INSURANCE, 2, 3. SCHOOLS AND SCHOOL DISTRICTS, 1. TAXATION, 5. WATERS, 3.

Insurance.

1. Judgment in a suit by the state against Supreme Forest, Woodmen Circle, *held* to be intended to preserve the society's affairs *in statu quo* until the governing body could interpret or amend its laws. *State v. Supreme Forest, Woodmen Circle* 29
2. Where, in a suit against a beneficial association, the supreme court has issued a restraining order, complaints of violations of the order or of misdemeanors of officers must be addressed to that court. *State v. Supreme Forest, Woodmen Circle* 29
3. When the supreme court has taken jurisdiction of the affairs of a beneficial association at the suit of the state insurance board, and has entered judgment and a restraining order, it will see that its judgment is not violated by the parties. *State v. Supreme Forest, Woodmen Circle*..... 29
4. An insurance company which requires a fixed premium in advance and provides benefits not dependent upon assessments, and does not provide for extra assessments, is not an assessment association as defined by sec. 3138, Rev. St. 1913. *Western Life & Accident Co. v. State Insurance Board* 152
5. Under secs. 3138, 3139, 3233, 3235, Rev. St. 1913, the state insurance board may require a mutual insurance company

Insurance—*Continued.*

which guarantees dividends in the form of paid-up insursurance to provide a reserve fund to meet such liability. *Western Life & Accident Co. v. State Insurance Board*..... 152

6. Where suicide is a defense in a suit on a certificate of accident insurance it is error to direct a verdict for plaintiff, if different minds may reasonably draw different conclusions from the evidence. *Rawitzer v. Mutual Benefit Health & Accident Ass'n.* 219
7. The secretary of a local lodge of a beneficial association who collects dues from members and remits to the association is its agent, and is presumed to inform the association as to his acts in its service. *Chandler v. Royal Highlanders* 223
8. Where the custom of an association to receive dues after time for payment leads assured to believe that his policy will not be forfeited if he pays in accordance with such custom, the association waives the right to forfeit the policy for such a delay. *Chandler v. Royal Highlanders*..... 223
9. Where the local lodge or its secretary makes payments for assured at his request as a loan, the fact that assured does not return such loan as agreed will not establish a custom by the association to extend time of payment. *Chandler v. Royal Highlanders* 223
10. Where the local lodge or its secretary advances assured's dues, and thereafter receives payment from him, the presumption is that the advances were at his request and as a loan. *Chandler v. Royal Highlanders* 223
11. Where assured requests the local lodge to advance his dues as a loan, and they are not forwarded within time, the association does not waive right of forfeiture provided in the contract. *Chandler v. Royal Highlanders* 223
12. A benefit society, incorporated in another state, doing business in Nebraska is subject to the same limitations as such an association organized in Nebraska. *Dworak v. Supreme Lodge* 297
13. Sec. 3298, Rev. St. 1913, prescribing beneficiaries of beneficiary associations, governs in Nebrasks contracts; the law of the domicile of a foreign association having no application. *Dworak v. Supreme Lodge* 297
14. The statute should be liberally construed in determining whether the beneficiary is a "dependent" within its meaning. *Koenigstein v. Finke* 449
15. When the beneficiary performs personal services for the insured under an agreement that he will contribute to her support by provision therefor in his will, she is to that extent dependent upon him. *Koenigstein v. Finke*..... 449

Insurance—*Continued.*

16. Where insured made one his beneficiary in his will, and the insurer with notice did not object, and in an action by the beneficiary and the administrator paid the money into court, *held* that it was a change of beneficiaries. *Koenigstein v. Finke* 449
17. Ambiguous terms in a certificate of insurance will be construed so as to accomplish the purpose intended, if that may be done without violence to expressed terms of the contract. *Routt v. Brotherhood of Railroad Trainmen* 763
18. Color-blindness so impairing sight that a trainman was unable to continue in train service, *held* complete and permanent loss of sight of both eyes within the meaning of an insurance certificate. *Routt v. Brotherhood of Railroad Trainmen* 763
19. A member's ignorance of by-laws of an insurance association does not entitle him to recover premiums paid while engaged in a prohibited occupation. *Pope v. Royal Highlanders* 774
20. The application for membership, certificate of insurance, and by-laws of a benefit association are to be construed together in determining the rights of the parties. *Pope v. Royal Higlanders* 774
21. Where a person voluntarily becomes a member of a benefit association, he is bound by by-laws under which membership is acquired. *Pope v. Royal Highlanders* 774
22. Under a policy insuring against loss by theft from a safe by use of tools or explosives, opening of inner doors by explosives *held* an "entry into the safe" by explosives, though the outer doors were not so opened. *Bruner Co. v. Fidelity & Casualty Co.* 825
23. In an action on a burglary policy, evidence *held* to sustain finding that no employee of insured was criminally implicated in the burglary. *Bruner Co. v. Fidelity & Casualty Co.* 825
24. Minor errors in books of assured *held* not to justify forfeiture of insurance under a provision against liability unless books of account were regularly kept. *Bruner Co. v. Fidelity & Casualty Co.* 825
25. The rule against additional insurance is not obviated by the fact that the original insurance is on a class of property, rather than any particular property. *Meyers v. German Fire Ins. Co.* 855
26. When insurer has elected to treat the policy as void for breach of condition providing for a forfeiture, assured has no claim for any unearned premium. *Meyers v. German Fire Ins. Co.* 855

Insurance—*Concluded.*

27. The "*pro rata* clause" providing that concurrent insurers shall share the loss applies only where the policy is valid, and is not a waiver of a provision for forfeiture in case of additional insurance being taken without insurer's consent. *Meyers v. German Fire Ins. Co.* 855

Judges.

1. Where a county judge was removed from office and another was appointed to fill the vacancy, and where on appeal the judgement of ouster was held void, *held* that the appointee was a *de facto* officer. *Hallowell v. Buffalo County*..... 250
2. Where a county has paid the salary of a county office to one in possession of the office, performing its duties with color of title, before his right to the office has been determined against him, it cannot thereafter be compelled to pay the same salary to the *de jure* officer. *Hallowell v. Buffalo County*.. 250

Judgment. See SPECIFIC PERFORMANCE, 2, 3.

1. A judgment based on a void act of the legislature will be reversed, if properly assailed, on appeal. *Sandhill Land & Cattle Co. v. Chicago, B. & Q. R. Co.* 24
2. Where, in an action for specific performance of a contract to sell land, plaintiff received credit for money paid on the contract, he could not thereafter sue to recover further damages for breach of contract. *Cunningham v. Lamb*..... 288
3. Judgment recovered in a foreign jurisdiction upon a domestic judgment will be voidable, where the original judgment is set aside and final judgment entered for adverse party. *Janous v. Columbus State Bank* 393
4. Where preponderance of evidence by officers and persons present when attempted service was made shows that no legal service was made, the service and judgment will be set aside and a new trial ordered. *Janous v. Columbus State Bank.* 393
5. Where plaintiff has recovered more than one judgment for the same injury against persons jointly and severally liable, his acceptance of satisfaction of one is satisfaction of all, except costs, and a bar to another action. *Irwin v. Jetter Brewing Co.* 409
6. The county court is a court of general jurisdiction in probate matters, and its judgments therein made upon due notice are final and cannot be collaterally attacked. *Fischer v. Sklenar* 553

Judicial Sales.

A judicial sale of land will not be set aside for inadequacy of price, unless it is so gross as to make it appear that it was the result of fraud or mistake. *First Nat. Bank v. Hunt*.. 743

Jury.

1. Sec. 9106, Rev. St. 1913, relating to a special venire, applies only when two or more persons are charged in the same indictment or information, and one of them has had a separate trial. *Koenigstein v. State* 229
2. Under sec. 8143, Rev. St. 1913, relating to summoning "other jurors," the sheriff need not apportion them equally to all parts of the county, and such apportionment to try a particular case is exceptional. *Koenigstein v. State* 229

Justice of Peace.

1. Interest accrued should be considered in computing the amount in controversy to determine jurisdiction of a justice of the peace. *Henke v. Deemer* 126
2. Actual amount of demand determines jurisdictional amount in justice's court. *Henke v. Deemer* 126
3. Where bill of particulars and summons both disclosed that amount of debt with interest exceeded $200, justice of the peace had no jurisdiction. *Henke v. Deemer* 126

Landlord and Tenant.

1. In absence of warranty, deceit, or fraud, lessee cannot recover for personal injuries from latent defects in the premises, of which lessor had no knowledge, and which were as patent to lessee as to lessor. *Rankin v. Kountze Real Estate Co...* 174
2. A farm lease, "for the term of one year with privilege of three years subject to sale," construed to authorize the lessor, by a sale and notice, to terminate the tenancy at the end of any rental year during the three-year period. *Van Sant v. Beuder* 680

Larceny.

1. To convict of cattle stealing, the state must prove beyond a reasonable doubt that accused participated in the larcenous taking with the intent to convert the animals to his own use. *Cheney v. State* 461
2. A felonious intent to convert stolen property to one's own use is a necessary element of larceny. *Cheney v. State* ... 461
3. Evidence *held* insufficient to sustain a conviction of cattle stealing. *Cheney v. State* 461
4. Evidence *held* insufficient to sustain conviction of larceny. *Jones v. State* 847
5. To constitute larceny, there must have existed a felonious intent in the mind of the accused at the time of the taking. *Jones v. State* 847

Libel.

1. One who publishes a statement relative to a candidate's qualifications and fitness for office is not liable in damages if the statement is true and is made with good motives, though such statements is libelous *per se*. *Estelle v. Daily News Publishing Co.* 610
2. The condition and situation in life of one injured by a libel may be shown in evidence and may be considered by the jury upon the question of damages. *Estelle v. Daily News Publishing Co.* 610

Life Estates.

Possession of land by life tenant is not adverse to remainderman, unless knowledge is clearly brought home to him that the life tenant claims the entire estate. *Criswell v. Criswell* 349

Limitation of Actions.

Limitations do not commence to run against a suit by the administrator of the estate of a beneficiary to recover from the trustee until the trustee repudiates his trust and refuses to transfer the property. *Holmes v. Doll* 156

Mandamus.

The action of the state banking board in granting or refusing a bank charter is reviewable by petition in error in the district court, which affords adequate remedy, and mandamus to compel a different action cannot be maintained. *State v. Morehead* 37

Master and Servant. See TRIAL, 4, 5.

1. Under the facts, plaintiff's injury *held* to be the result of an accident which arose out of and in the course of his employment, within the workmen's compensation act. *Manning v. Pomerene* 127
2. Where the evidence as to whether disability was caused by an accident was conflicting, but sufficient to sustain the finding to that effect, the judgment will not be disturbed. *Manning v. Pomerene* 127
3. In an action by a switchman for personal injuries, evidence *held* insufficient to show that locomotives being moved when he received his injuries were instruments of interstate commerce. *Stapleton v. Chicago, B. & Q. R. Co.* 201
4. Under secs. 3674, 3679, Rev. St. 1913, of the employers' liability act, the limit of six months for claiming compensation and one year for agreeing on compensation, or for filing petition, does not begin to run until six months after removal of physical or mental incapacity. *Simon v. Cathroe Co.* 211

Master and Servant.—*Continued.*

5. In an employee's action under employers' liability act, evidence *held* to sustain finding, as to time of filing claim for compensation, that plaintiff was physically incapacitated from time of accident to time of trial. *Simon v. Cathroe Co.* 211
6. In an action by a street railway conductor for personal injuries from contact with a charged wire, defendant's negligence in maintaining it 5½ feet above top of car *held* a question for the jury. *Wright v. Omaha & C. B. Street R. Co.* 292
7. In an action by an employee for injury, where the defense was that the danger was obivous, and that the employee assumed the risk, but the evidence showed that he protested and was peremptorily ordered to perform the task, there was a waiver of the defense. *Shick v. Johnson* 328
8. In an action by an employee for injury from a hidden danger which was known to the master, it is sufficient to show that the service was in the line of his employment and was consented to by the employer without warning of the danger. *Shick v. Johnson* 328
9. Under the workmen's compensation act, compensation cannot be awarded for loss of a toe unless the injury has impaired the employee's earning power. *Epsten v. Hancock-Epsten Co.* 442
10. Under the workmen's compensation act, the fact that the employee earns higher wages after than before the injury will not deprive him of compensation, where he receives such higher wages by reason of his subsequent education and training. *Epsten v. Hancock-Epsten Co.* 442
11. Under the workmen's compensation act, an employer who has provided necessary medical attention during three weeks subsequent to an injury is not liable for medical expenses subsequently incurred after blood poisoning developed. *Epsten v. Hancock-Epsten Co.* 442
12. Where place to work and appliances are reasonably safe, the employer is not liable for misuse of such appliances by a fellow employee employed with reasonable care as to his fitness. *Poos v. Krug Brewing Co.* 491
13. The employer is not liable for anything that he could not avoid by foresight and care. *Poos v. Krug Brewing Co.* 491
14. The employer must furnish a reasonably safe place to work and reasonably safe tools and appliances, and he is liable for injury by failure to do so, unless the employee was negligent or assumed the risk. *Poos v. Krug Brewing Co.* .. 491

Master and Servant—*Concluded.*

15. Where the nature of the act shows that accident was due to negligence of a fellow servant, and not to any defect in place to work or appliances, the employer is not liable. *Poos v. Krug Brewing Co.* 491
16. The employer performs his duty when he furnishes place to work and appliances which are safe when used in the usual and proper way. *Poos v. Krug Brewing Co.* 491
17. Where place to work and appliances are unsafe, the employer must make them reasonably safe, and he cannot delegate such duty. *Poos v. Krug Brewing Co.* 491
18. Under the employers' liability act, dependency is not based solely upon a present legal obligation to support. *Parson v. Murphy* 542
19. Under the employers' liability act, the question of a parent's dependency is not determined by whether decedent had or had not contributed to parent's support before the accident. *Parson v. Murphy* 542
20. Evidence *held* to show that claimant was a dependent. *Parson v. Murphy* 542
21. In an action under the employers' liability act, evidence *held* to sustain finding for plaintiff. *Young v. Western Furniture & Mfg. Co.* 696
22. Death of employee *held* due to "accident," as defined by sec. 52 of the employers' liability act. *Young v. Western Furniture & Mfg. Co.* 696
23. Evidence *held* to sustain finding that death resulted from an accident, as defined by sec. 3693, Rev. St. 1913. *Kanscheit v. Garrett Laundry Co.* 702
24. The master should exercise ordinary care for the safety of his employees, but he may assume that they will exercise the same care for their own safety. *Merkouras v. Chicago, B. & Q. R. Co.* 717
25. A railroad company, in ordering movements of cars, would not anticipate that two switchmen would scuffle upon its track, while momentarily expecting the approach of cars. *Merkouras v. Chicago, B. & Q. R. Co.* 717
26. A railroad company does not owe its employees the duty of keeping a constant lookout to warn them of dangers of which they already have knowledge. *Merkouras v. Chicago, B. & Q. R. Co.* 717
27. A rule of a railroad company, susceptible of two constructions, one of which has never been given it, and which was not relied upon by the party asserting it, will not be given that construction by the courts. *Merkouras v. Chicago, B. & Q. R. Co.* 717

Mortgages.

1. The holder of a deed, given to secure advances, who pays one of a series of notes secured by mortgage on the land is not entitled in foreclosure proceedings to share *pro rata* in proceeds of the sale. *McQuilkin v. Ford* 474
2. In absence of agreement therefor, mortgagee is not required to insure buildings on mortgaged premises, nor to prosecute at his own expense a disputed claim for insurance on account of a prior policy which he had on the building destroyed. *McQuilkin v. Ford* 474
3. The district court may decree the sale of mortgaged property in parcels or *en masse*. *First Nat. Bank v. Hunt* 743
4. Where a foreclosure decree does not direct the manner of sale, and the property is contiguous and was mortgaged as a single tract, its sale as such will not be disturbed, in absence of showing of prejudice to complainant. *First Nat. Bank v. Hunt* 743
5. Where land is mortgaged as an entire tract, the debtor, if he desires it sold in parcels, should apply to the court to direct the officer as to manner of sale, or should point out to the officer the manner of sale to best advantage. *First Nat. Bank v. Hunt* 743
6. Where the record does not show that the judgment debtor requested that land be sold in separate tracts, he cannot have the sale set aside because it was sold *en masse*. *First Nat. Bank v. Hunt* 743
7. A court of equity on appeal may impose terms as a condition to setting aside confirmation and allowing a resale of land. *First Nat. Bank v. Hunt* 743

Municipal Corporations. See CONSTITUTIONAL LAW, 2-4.

1. The Omaha city charter makes no provision for appeal from equalization and assessment of special taxes by the metropolitan water district, and an attempt to appeal confers no jurisdiction on the district court. *McCague Investment Co. v. Metropolitan Water District* 820
2. District courts have jurisdiction to review by proceedings in error an order by the board of equalization of the metropolitan water district. *McCague Investment Co. v. Metropolitan Water District* 820
3. Sec. 5300, Rev. St. 1913, providing for the selection and removal of officers by the city council, *held* to apply to the city of Lincoln. *State v. City of Lincoln* 57
4. Levy of tax by city of Lincoln for campus extension to induce location of state university is for a corporate purpose,

Municipal Corporations.—*Concluded.*

and sec. 4546, Rev. St. 1913, authorizing such levy, does not violate sec. 6, art. IX, Const. *Sinclair v. City of Lincoln* .. 163

5. Whether location of state university in city of Lincoln would be beneficial to the city at large was a question for the city authorities. *Sinclair v. City of Lincoln* 163
6. Under a contract for construction of city water-works, city's supervising engineer *held* the sole arbiter between the contractor and the city, and that in absence of fraud his final estimate of amount due the contractor was conclusive. *Katz-Craig Contracting Co. v. City of Cozad* 189
7. Sec. 4583, 1913, requiring written notice of defective street to be filed with the city clerk five days before occurrence of an injury, does not apply where defects were obvious and existed when the city opened the street, without guarding or warning against them. *McMasters v. City of Lincoln* 278
8. In an action for injury from defect in a street which the city had left unguarded when it opened the street, city's negligence was question for the jury. *McMasters v. City of Lincoln* 278
9. Where a city motor vehicle was being tested under its direction and was not in performance of any governmental duty, the city is liable for damages caused by its operation. *Opocensky v. City of South Omaha* 336
10. The right to occupy part of a public street in front of one's place of business must yield to public necessity, of which necessity the municipal governing body is the judge; but such body cannot arbitrarily deny the right to one and grant it to another. *Kenney v. Village of Dorchester* 425
11. Sec. 4210, Rev. St. 1913, reserves to the state the right to fix the compensation of firemen in cities of the metropolitan class. *Adams v. City of Omaha* 690
12. Sec. 4210, Rev. St. 1913, as amended by ch. 77, Laws 1915, fixes the compensation of firemen in metropolitan cities, and the city authorities have no power to provide different compensation. *Adams v. City of Omaha* 690

Negligence. See MASTER AND SERVANT.

1. In an action for damages for negligence of defendant, plaintiff may recover, although himself guilty of contributory negligence, if his negligence was slight as compared with defendant's negligence. *Sodomka v. Cudahy Packing Co.* 446
2. Whether plaintiff's contributory negligence, if any, was slight as compared with defendant's negligence is a question for the jury. *Sodomka v. Cudahy Packing Co.* 446

Negligence—*Concluded.*

3. To open the door of an elevator shaft and then turn one's back and enter it without looking to see whether the elevator is there is gross negligence preventing recovery for injury from falling down the shaft. *Sodomka v. Cudahy Packing Co.* 446
4. Evidence of repairs made or precautions taken after an injury is not admissible to prove antecedent negligence. *Tankersley v. Linclon Traction Co.* 578

New Trial.

1. Where the presiding judge is unavoidably prevented from ruling on motion for new trial, another judge may perform that duty. *Hauser v. State* 834
2. A new trial should not be granted for newly-discovered evidence, unless such evidence is shown to be material, and could not by reasonable diligence have been produced at the trial. *Jackson v. Omaha & C. B. Street R. Co.* 456
3. The granting of a new trial being discretionary with the trial court, its action will not be disturbed, unless abuse is shown. *Bruner Co. v. Fidelity & Casualty Co.* 825

Parties. See CONSTITUTIONAL LAW, 5. HUSBAND AND WIFE, 2.

Under secs. 7609-7611, Rev. St. 1913, any person claiming an interest in the subject-matter of an action may intervene at any time before trial, as a matter of right. *In re Estate of Keller* 115

Partnership.

1. A special administrator to settle with the surviving partner of a decedent is authorized by sec. 1381, Rev. St. 1913, only when such surviving partner is also executor or administrator of the decedent's estate, including the residuary estate. *In re Estate of Enyart* 25
2. Where a decedent's surviving partner is executor of a will disposing of only a part of the estate, and there is also a general administrator for the whole property, the general administrator must settle with the surviving partner, and special administration is not allowed therefor. *In re Estate of Enyart* 25

Pleading. See APPEAL AND ERROR, 2, 3.

1. Where, pending administration, a claimant petitioned to be decreed the sole heir, and the state filed answer and cross-petition denying the heirship and praying for an escheat, *held* that the pleading, though irregular, alleged an interest adverse to the petitioner, and that it was error to strike it from the files. *In re Estate of Keller* 115

Pleading—*Concluded.*

2. Where a petition, construed with reference to its general theory, states a cause of action for negligence, the refusal to construe it as also stating a cause of action for trespass based on an allegation amounting to a legal conclusion is not error. *Omaha Electric Light & Power Co. v. Butke* 159
3. A defendant may plead several defenses, provided they are not so repugnant that if one be true another must be false. *Rawitzer v. Mutual Benefit Health & Accident Ass'n* 219
4. In an action against two joint tort-feasors, plaintiff cannot by supplemental petition plead a settlement with one and the amount paid. *Tankersley v. Lincoln Traction Co.* 578
5. Allegation in petition in an action on a note that plaintiff is an innocent purchaser for value before maturity does not constitute the cause of action, but is a plea in avoidance, and is usually reserved for the reply. *Farmers State Bank v. Butler* 635
6. Where an answer sets up special defenses against a note, plaintiff may allege facts in avoidance in reply. *Farmers State Bank v. Butler* 635
7. Allegation that plaintiff's negligence was the sole cause of her injuries amount to a specific denial of allegation that defendant's negligence was the proximate cause. *Haight v. Omaha & C. B. Street R. Co.* 841

Pledges.

A creditor who sells collateral for more than the amount of his claim and refuses to pay the surplus to he debtor is liable in an action for conversion of such surplus. *Palmer v. Parmele* 691

Principal and Surety.

A surety, in whose favor limitations have not run when he pays his principal's debt, may exact contribution from a cosurety in another state, under whose laws the creditor's claim against the cosurety was barred when the debt was paid. *Frew v. Scoular* 131

Process. See JUDGMENT, 4.

1. Where a judgment is attacked collaterally, or where the correctness of the sheriff's return is assailed long after judgment, great faith and credit must be given to the return. *Janous v. Columbus State Bank* 393
2. Where the officer hands copy of summons to defendant, and immediately retakes it, the proof must show that defendant knew, or had reason to suppose, that it was a summons for her, or such service will be invalid. *Janous v. Columbus State Bank* 393

Railroads. See MASTER AND SERVANT, 24-27.

1. Where a railroad company had permitted a bridge to be used as a passageway for many years, and this was well known to its agent and employees, a pedestrian using the bridge was not a trespasser, but a licensee, and the company was bound to use ordinary and reasonable care to see that he was not injured by its negligence. *Peterson v. Chicago, M. & St. P. R. Co.* 3
2. One driving on a highway approaching a railroad crossing must look and listen, and his failure to do so, without reasonable excuse, is negligence. *Askey v. Chicago, B. & Q. R. Co.* 266
3. The driver of an automobile approaching a familiar railroad crossing, whose view is obstructed, must keep his car under control. *Askey v. Chicago, B. & Q. R. Co.* 266
4. Railroad company *held* not liable for death of automobile driver in collision at crossing. *Askey v. Chicago, B. & Q. R. Co.* 266
5. A passenger in an automobile who failed to request the driver to stop or to take necessary precautions while approaching a dangerous railroad crossing cannot recover for personal injuries from collision, though no signal was given. *Morris v. Chicago, B. & Q. R. Co.* 479
6. A traveler on a public highway approaching a railroad crossing must exercise ordinary care, and if he fails to do so, and is injured by collision, he cannot recover. *Morris v. Chicago, B. & Q. R. Co.* 479
7. To recover for injury at a railroad crossing, it is not enough to show that claimant was injured at the crossing, and that no signal was given, but he must further show that such neglect was the proximate cause of injury. *Morris v. Chicago, B. & Q. R. Co.* 479
8. Evidence *held* insufficient to sustain recovery for injury at crossing. *Morris v. Chicago, B. & Q. R. Co.* 479
9. Law stated as to railroad's duty under secs. 6035, 6036, Rev. St. 1913, as to inclosure of right of way. *DeGraw v. Chicago, B. & Q. R. Co.* 724
10. Under the evidence, *held* that liability for price of cattle killed on railroad right of way was for the jury. *DeGraw v. Chicago, B. & Q. R. Co.* 724
11. Railroad company *held* not required to inclose its right of way where it would increase danger to human life. *DeGraw v. Chicago, B. & Q. R. Co.* 724
12. Evidence, in action for injury at crossing, *held* insufficient to sustain verdict for plaintiff. *Tynon v. Missouri P. R. Co.* 810

Rape. See CRIMINAL LAW, 31.

1. The unsupported evidence of prosecutrix that rape was repeated subsequent to alleged commission of offense charged is not corroborative of her testimony as to commission of that offense. *Gammel v. State* 532
2. Testimony of the prosecuting witness alone will not support a conviction of rape. *Gammel v. State* 532
3. Facts and circumstances necessary to corroborate testimony of prosecuting witness must be proved by other witnesses, and her testimony as to other matters is not corroborative of her own testimony as to the principal fact. *Gammel v. State* 538

Receivers. See DIVORCE, 4.

Remainders.

Possession by one under a void administrator's deed was adverse to remaindermen, so as to commence running of statute barring an action *quia timet* or for possession, from the time they knew or might have known that the one in possession claimed the entire estate. *Criswell v. Criswell* 349

Schools and School Districts.

1. Expenses incurred by president of board of education and superintendent of schools in attending a congress of school hygiene, under authority of the board, are not necessary expenses in the performance of official duties, and their payment may be enjoined. *Smith v. Holovtchiner* 248
2. Plaintiff *held* entitled to attend public school in defendant school district without payment of tuition on the ground of residence; a married sister with whom plaintiff lived standing *in loco parentis*. *Martins v. School District* 258
3. Omaha school district *held* not justified in refusing to admit qualified nonresident pupils to its high school on payment of statutory fee. *State v. School District* 263
4. An order of a board adjusting boundaries of school districts *held* reasonable. *Gauchat v. School District.* 377
5. The policy of Nebraska is to furnish free high school education to all youth of the state. *School District v. Wilson*.. 683
6. Sec. 6831, Rev. St. 1913, requires each county to furnish free high school privileges to the youth of the county; but there is no statute requiring parents of children entitled to such privileges to pay therefor. *School District v. Wilson*.. 683
7. Where children of a district having no free high school were certified to an adjoining district and there attended high school without objection, *held* that the law did not imply an agreement by their parents to pay therefor. *School District v. Wilson* 683

Set-Off.

1. Claims for damages for torts cannot be offset against promissory notes. *Vanderlip v. Barnes* 573
2. A judgment may be set off against another judgment or against a claim upon contract. *Vanderlip v. Barnes* 573

Specific Performance.

1. An oral agreement to convey realty will be specifically enforced where the evidence is clear and plaintiff has fully performed. *McNea v. Moran* 476
2. In a suit for specific performance, all damages from defendant's breach of contract are litigable, and separate actions to recover different elements of such damages cannot be maintained. *Waldo v. Lockard* 797
3. After satisfaction of a decree for specific performance of a contract to transfer property to plaintiff, he cannot, on account of the same breach, maintain a separate action for rents and interest for detention of the property pending litigation. *Waldo v. Lockard* 797

States.

1. The state is not bound by the unauthorized acts of its agents, and public policy requires that such acts be restrained, and, when contrary to public interest, annulled. *State v. Cording,* 243
2. Where the state by its authorized agents executes an ambiguous conveyance, and it has been understood and acted upon by the public generally in a manner acquiesced in by the state, the original right of the state to assert a different construction, after great lapse of time, may be considered as abandoned. *State v. Cording* 243

Statute of Frauds.

In absence of proof that a check was given under agreement that it should constitute payment or part payment of the price of live stock, it was not such payment as to take an oral contract of sale out of the statute of frauds. *Bates v. Dwinell* 712

Statutes. See JUDGMENT, 1.

1. In the construction of a statute, effect must be given, if possible, to its several parts. *State v. City of Lincoln* 57
2. In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but not to enlarge its scope to include a subject not fairly expressed in the body of the statute. *State v. City of Lincoln* 57

Statutes—*Concluded.*

3. It is the duty of the court to discover, if possible, the legislative intent from the language of the act. *State v. City of Lincoln* 57
4. In the construction of a statute, courts take judicial notice of events and conditions generally known within their jurisdiction. *State v. City of Lincoln* 57
5. Amendment (Rev. St. 1913, sec. 4546) authorizing city to levy taxes for university campus extension is germane to the general provision of the statute specifying purposes for which taxes may be levied. *Sinclair v. City of Lincoln* 163
6. Ch. 121, Laws 1915, providing for adjustment of boundaries of school districts, *held* not in violation of sec. 11, art. III of the Constitution. *Gauchat v. School District* 377

Taxation. See CONSTITUTIONAL LAW, 2, 3. MUNICIPAL CORPORATIONS, 4. STATUTES, 5.

1. Facts which render property exempt from taxation under sec. 6301, Rev. St. 1913, must be affirmatively established. *Mt. Moriah Lodge v. Otoe County* 274
2. Evidence *held* insufficient to show that property of plaintiff lodge is exempt from taxation, as used solely for charitable purposes. *Mt. Moriah Lodge v. Otoe County* 274
3. A pipe line connecting springs with a railroad's water system and the necessary land about the springs should be assessed by the state assesment board, and not by the county board. *Chicago, B. & Q. R. Co. v. Webster County* 311
4. Under sec. 6351, Rev. St. 1913, the total taxable value of mortgaged land cannot exceed the sum of the interest of the mortgagor and mortgagee. *Bowen v. Holt County* 642
5. Where more than the total value of mortgaged land is made the basis of assessment and taxation, collection of tax upon such excess may be enjoined on application of the party injured. *Bowen v. Holt County* 642
6. The rule of uniformity prescribed by sec. 1, art. IX, Const., inhibits the legislature from discrimination between taxpayers. *City Trust Co. v. Douglas County* 792
7. Where mortgagor of realty has not agreed to pay taxes on mortgage interest, which under sec. 6349, Rev. St. 1913, is an interest in realty, individual and corporation holders of mortgages must pay such taxes in the county in which the mortgaged land lies. *City Trust Co. v. Douglas County* .. 792
8. Discrimination not being permitted in taxation by valuation, neither an individual nor a corporate holder of a mortgage is subject to assessment for taxation of the mortgage in the county of his or its domicile. *City Trust Co. v. Douglas County* 792

Taxation—*Concluded.*

9. Sec. 6313, Rev. St. 1913, does not require the holder to list for assessment shares of a domestic corporation when its capital stock is assessed in the state. *City Trust Co. v. Douglas County* 792
10. Where the value of individuals' shares of stock of a domestic trust company has been included in valuation of its capital stock, such valuation will be deducted in determining the actual value of such stock for taxation. *City Trust Co. v. Douglas County* 792

Treaties.

Treaties should be construed liberally. *Fischer v. Sklenar* ... 553

Trial. See APPEAL AND ERROR. CRIMINAL LAW. RAILROADS, 10.

1. It is error to instruct the jury that certain allegations of negligence are to be considered, and also that such allegations should be disregarded. *Peterson v. Chicago, M. & St. P. R. Co.* 3
2. It is error to give an instruction which assumes as established a disputed question of fact. *Willman v. Sandman*.. 92
3. The court should instruct the jury to find for defendant when the evidence is not sufficient to sustain verdict for plaintiff. *Pollock v. Pearson* 284
4. An instruction describing an alleged act not counted upon as negligence justifying a recovery, on proof of which the jury might infer that they should find for plaintiff, is erroneous. *Shick v. Johnson* 328
5. Where the petition alleges several acts of negligence, but alleges facts amounting to actionable negligence in only one, an instruction to find for plaintiff if defendant is found guilty of any act of negligence alleged is erroneous. *Shick v. Johnson* 328
6. Aggravated misconduct of counsel in stating prejudicial facts outside the record and in urging a disregard of the law requires a reversal of a judgment for his client, notwithstanding the court's reprimand and direction that the jury base their findings on the evidence and instructions. *Hansen v. Mallett* 339
7. Where it is necessary to use photographs of place of accident taken after material change in surroundings, the court should charge the jury as to the extent of their use. *Tankersley v. Lincoln Traction Co.* 578
8. Though an instruction is not specific, if it is not misleading, it is not cause for reversal, where complainant made no request for a more specific instruction. *Webb v. Omaha & S. I. R. Co.* 596

Trial—*Concluded.*

9. Where the evidence does not warrant a verdict for defendant, the court should instruct for plaintiff. *Farmers State Bank v. Butler* 635
10. It is improper for counsel in argument to go outside the evidence and assert, as of his own knowledge, contradictory statements of a witness. *Merkouras v. Chicago, B. & Q. R. Co.* 717
11. Where defendant pleads facts inconsistent with plaintiff's allegations of negligence, and also facts amounting to negligence of plaintiff, he cannot complain of instructions that plaintiff must prove defendant's negligence, and that he must prove plaintiff's negligence, in absence of request for more specific instructions. *Haight v. Omaha & C. B. Street R. Co.* 841

Trusts.

1. Where two persons purchase realty, each contributing one-half of the purchase price, and title is taken in the name of one, a resulting trust arises in favor of the other. *Ahrens v. Simon* 739
2. Trust property conveyed by a trustee *ex maleficio* to his prospective wife in consideration of marriage cannot be followed by the *cestui que trust*, where the grantee acquired title in good faith. *Johnson v. Petersen* 504
3. Evidence *held* to establish a resulting trust. *Ahrens v. Simon* 739

Vendor and Purchaser.

In an action for breach of a contract to convey land, the amount paid on the contract is a proper element of damages. *Cunningham v. Lamb* 288

Venue.

Refusal of change of venue being discretionary with trial judge, his ruling will not be disturbed unless abuse is shown. *Hauser v. State* 834

Voluntary Associations.

1. Courts will not interfere with enforcement of reasonable rules of a voluntary association. *O'Brien v. South Omaha Live Stock Exchange* 729
2. One becoming a member of a voluntary association thereby agrees to submit to its rules and is bound by their enforcement. *O'Brien v. South Omaha Live Stock Exchange* 729
3. Where a member of a live stock exchange pleaded guilty to violation of its rules, and was expelled from membership, his certificate of membership was automatically canceled. *O'Brien v. South Omaha Live Stock Exchange* 729

Voluntary Associations—*Concluded.*

4. A hearing on charges of bad faith and dishonesty against a member of a live stock exchange is not to be tested by the strict rules of criminal practice, where the member was notified in writing of the charges, and consented to the hearing and pleaded guilty. *O'Brien v. South Omaha Live Stock Exchange* 729
5. A member of an unincorporated voluntary live stock exchange consents to its reasonable and uniform rules and is subject to the discipline they provide. *Ihnen v. South Omaha Live Stock Exchange* 195

Waters.

1. Overflow waters of a stream which disappear by evaporation or percolation may be defended against as surface waters, but overflow waters which flow in an accustomed course into the same or another stream are not surface waters, and, if negligently obstructed by a railroad embankment, the company is liable for damages to crops caused thereby. *Murphy v. Chicago, B. & Q. R. Co.* 73
2. Where some damage to crops would have resulted from overflow of stream if a railroad embankment had not been built, the company was only liable for the additional damages caused by the embankment. *Murphy v. Chicago, B. & Q. R. Co.* 73
3. Injunction to prevent village from diverting waters along a highway to plaintiff's railroad embankment *held* properly denied, where plaintiff had disregarded its duty under sec. 3016, Rev. St. 1913, to construct a culvert at the highway crossing, and failed to prove that injury from such diversion would nevertheless have occurred. *Union P. R. Co. v. Village of Eddyville* 149
4. While a prior appropriator carrying water for hire is developing its right, an upper proprietor's use of water under a subsequent appropriation which does not deprive the prior appropriator of water is not adverse. *Kilpatrick Bros. Co. v. Frenchman Valley Irrigation District* 155
5. Under sec. 5119, Rev. St. 1913, a village may furnish water for public purposes and for the use of the inhabitants in arid and semi-arid districts. *Thornton v. Kingrey* 631

Wills. See EVIDENCE, 9-13.

1. When it is shown that a will has been signed and attested by the statutory number of witnesses, and it is conceded that the testator was of sound mind, the will is presumed to be valid. *In re Estate of Dovey* 11

Wills—*Continued.*

2. To set aside a will on the ground that it was procured by undue influence, competent proof is required, and the burden of proof is ordinarily on the contestant. *In re Estate of Dovey* 11
3. Evidence *held* to justify a finding that a contested will expressed the true intention of the testatrix and was not procured by undue influence. *In re Estate of Dovey* 11
4. The due execution of a will may be proved by the testimony of the attesting witnesses, though the attesting clause is excluded from the consideration of the jury. *In re Estate of Dovey* 11
5. It is within the discretion of the trial court to reject evidence of declarations, made by testatrix four or five years before she executed her will, that she did not intend to make a will. *In re Estate of Dovey* 11
6. Where evidence of undue influence is specifically denied, a verdict that the will was valid will not be disturbed for lack of evidence. *In re Estate of Dovey* 11
7. Where in a will contest there was no evidence to sustain the allegation of undue influence, the court properly withdrew that question from the jury. *Beindorff v. Anthes* 44
8. Will construed, and *held* that devised land should be divided equally among testator's heirs and his wife's heirs. *Dunn v. Elliott* 411
9. Devise of "our land" to wife for life and on her death to be distributed between "our heirs," where there were no children to whom such words could apply, *held* to present an ambiguity permitting parol evidence to ascertain its meaning. *Dunn v. Elliott* 411
10. An option to purchase property of the estate, whether at an appraised value or at a price agreed upon, may be created by will. *Watson v. Riley* 511
11. Under a will giving right to take certain land at a price, acceptance of devise and offer to pay the price *held* to vest title in devisee. *Watson v. Riley* 511
12. In a contest of a will for forgery, where the subscribing witnesses are dead, proof of their signatures and of testator's signature is necessary. *In re Estate of O'Connor* 617
13. In a contest of a will for forgery, proponent should introduce all his evidence as to the genuineness of signatures of subscribing witnesses and of testator, and the court may refuse to permit him on rebuttal to offer additional affirmative evidence on that issue. *In re Estate of O'Connor* 617

Wills—*Concluded.*

14. Evidence, in a contest of probate of a will for forgery, *held* to support finding for contestants. *In re Estate of O'Connor* 617
15. Where the husband dies testate, seised of a homestead, and the widow elects to take under the statute, the court will first award her homestead interest not subject to debts. under sec. 3092, Rev. St. 1913, and then award her share as heir, under sec. 1265, Rev. St. 1913. *In re Estate of Grobe*.. 786
16. Election by widow to take under the statute does not render the will inoperative as to other persons. *In re Estate of Grobe* 786

Witnesses. See EVIDENCE.

1. When one submits to an examination by a physician, the knowledge acquired is privileged. *Stapleton v. Chicago, B. & Q. R. Co.* 201
2. Where plaintiff permitted a physician to take a radiograph of his injured foot to ascertain the extent of injury, the radiograph was not admissible in evidence over plaintiff's objection. *Stapleton v. Chicago, B. & Q. R. Co.* 201
3. A transaction or conversation within sec. 7894, Rev. St. 1913, is an action participated in by witness and decedent, to which, if alive, decedent could testify of his personal knowledge. *Hlavaty v. Blair* 414
4. It is error to exclude evidence tending to impeach a witness on a material fact sworn to by him, where proper foundation has been laid therefor. *State v. Turnquist* 417
5. In an action involving title to realty, a wife whose husband claimed as purchaser under an oral agreement is competent to testify to a conversation between her husband and the vendor, since deceased, in which she took no part. *McNea v. Moran* 476
6. A party surprised by testimony of witness may, in the court's discretion, interrogate him as to previous inconsistent statements, to give him opportunity to correct any mistake, and to show the circumstances which induced him to call the witness. *Merkouras v. Chicago, B. & Q. R. Co.* 717
7. A party cannot prove contradictory statements of his own witness, to discredit him. *Merkouras v. Chicago, B. & Q. R. Co.* 717